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WAR DEPARTMENT

U.S. Army

TECHNICAL MANUAL

CASES ON MILITARY GOVERNMENT

May 20, 1943

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TM 27-250

TECHNICAL MANUAL

CASES ON MILITARY GOVERNMENT

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1943

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WAR DEPARTMENT,
WASHINGTON, May 20, 1943.

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[A. G. 062.111 (2–25–43).]

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:
J. A. ULIO,
Major General,
The Adjutant General.

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WAR DEPARTMENT
WASHINGTON, May 20, 1943.

CASES ON MILITARY GOVERNMENT

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TABLE OF CASES

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SECTION I

OCCASION FOR MILITARY GOVERNMENT

(See FM 27–5, pars. 3–5, 10, and 32–34; and 27–10, pars. 281–286.)

UNITED STATES v. REITER

Provisional Court, State of Louisiana, July 1865

Federal Case No. 16,146

The accused were tried before Judge Peabody and a jury, and were severally convicted; [Augustus] Reiter of murder, and [John] Louis of arson. After the convictions a motion was made in each case in arrest of judgment.

* * * * * * *

PEABODY, PROVISIONAL JUDGE. These two cases may without inconvenience or danger of confusion be considered together, although they have in fact no connection with each other. The same objection to the proceeding of the court to pronounce sentence upon the accused and in arrest of judgment, is made by both the defendants, and although the objection is urged on different grounds in the two cases, still the objection is proper to be considered on all the grounds in each case. It is urged that this court is not authorized to try these defendants, and that its proceedings have not the sanction of law in the premises. If for any reason this be the case, no further steps should be taken. If for any reason the authority is wanting in one case it is equally so in the other, and the court should refrain from going further in either case. The accused have been indicted separately and tried separately on charges wholly different and having no connection the one with the other, and the consideration of their cases together rather than separately, now, is a matter of convenience solely. One of the accused, Reiter, has been indicted for murder, in causing the death of his wife by violence. The other has been indicted for arson, in burning a building used as a mansion or dwelling-house. Each has been tried before a jury of this parish and been duly convicted of the offence charged in the indictment, and each is

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now before the court on a motion in arrest of judgment, and in each case the arrest is urged on the ground that the court is not authorized in law and has not jurisdiction to try the case. The counsel for Reiter claim that the court, in its constitution and creation, had not originally the warrant of law to try the accused. The counsel for Louis concede that the court had authority originally to entertain and try such a case, but insist that for causes occurring since, its authority has ceased; that certain steps taken in Louisiana toward the re-establishment of a civil state government have superseded the powers once possessed by the court, and that it is now without jurisdiction or power. The offences of which the defendants stand convicted, by the laws of Louisiana are punishable with death, and nothing would be more agreeable to the court than to proceed with the utmost caution in considering these objections to its jurisdiction. The accused have been indicted, tried, and convicted under and pursuant to the law of the state of Louisiana.

The first question to be considered is whether the court has ever had, from the nature of its origin and constitution, authority to try cases like these; and if this question shall be decided in the affirmative it will remain to examine.

The second question, namely, whether the power to try or the jurisdiction over such a case, once possessed by this court, has been withdrawn or lost,—whether the court in fact has been in any way deprived of it by subsequent events.

It must be conceded that the court, in its origin and structure, is quite out of the usual course and novel. It has not its origin or foundation in any constitutional or legislative enactment—is not the creature of any regularly-organized constitutional or legislative body. Ordinarily the judicial tribunals of the land are the creations of the legislative departments either of the state or federal government, and for the regularity of their creation and the character and extent of their powers depend on the action of the legislative branch of the one or the other of these powers. In such cases, the first thing to be done in ascertaining the legality or powers of a court, is to consult the constitution and legislation of the government from which it claims to hold commission, and in the letter of these is found the act of its creation and the extent and limit of its powers. Not so with this provisional court, which depends for its existence on the law of nations, and on that part of the law of nations relating to war—the law by which parties and neutrals are guided in their treatment of each other in a state of war; and that portion of it which relates to and determines the rights and duties of a belligerent, a conqueror in the territory of an enemy and holding it in armed occupation. On

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that law must depend the decision of the question presented by this motion, of the validity in law and the powers of this court. On that law alone must this court rely for the power and jurisdiction it has exercised for a considerable time, in a large number of cases involving amounts usually very large. It was in that law that the president of the United States, pressed by the urgent wants of the community here, found his warrant for the establishment of this court in the midst of the country of an enemy held by him jure belli in armed belligerent occupation.

The authority of this court is derived from the president of the United States, the chief executive of the nation and commander-in-chief of its forces military and naval. It is conferred by an order, of which the following is a copy:

"Executive Order, Establishing a Provisional Court in Louisiana.

"Executive Mansion, Washington,
"October 20, 1862.

"The insurrection which has for some time prevailed in several of the states of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that state, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the state in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a provisional court, which shall be a court of record for the state of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be provisional judge to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana, his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the president, not exceeding beyond the military occupation of the city of New Orleans, or the restoration

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court described as the state of Louisiana, had been for many months held and occupied by those people and their forces, military and naval. That it had been for a long time previous to, and also since the commencement of this war, inhabited, cultivated, and owned by the same people who had entered into and carried on war with the government of the United States, and that it was still so inhabited by a people whose relations with the government of the United States had for some time been and were still those of enmity. That it had, in the course of the war, been by force of the arms of the United States wrested from the enemy, and was at the time the order establishing this court was made, held by the forces of the United States in armed belligerent occupation. That the armed belligerent forces of this enemy of the United States had been, by force of the arms of the United States, expelled from this country, and that they were at the time held out of it by the armed forces of the United States, and that war was still waged between those belligerents. The civil institutions of the country thus held, including the tribunals for the administration of justice, had been formed and established by the enemy of the conquering power, and were by it administered at the time of the conquest. These institutions having been formed, established, and administered by the government existing previous to and at the time of the conquest confessedly hostile to the government of the United States, were the only institutions found there at the time the military authority of the United States was by force of its arms established there.

By the conquest of the country, in this case as in others, the previously-existing government and the power by which it was administered were subverted and swept away, and those of the conquering power were substituted in their places. This is the necessary consequence of a conquest of a country—a transfer of the control, government, and sovereignty of it from one party to another. The old power is conquered and extinguished, and the new one of the conqueror is instituted in its place. The old institutions, if not abandoned and extinguished, are at least suspended in their action. They may be transferred to and adopted by the new governing power and may be used and operated by it, just as an old machine, detached from the power that has usually moved it, and abandoned for use as a whole, may furnish isolated pieces of machinery which can profitably be introduced into a new machine having different qualities, moved by a new and wholly another power, and used to accomplish on the whole, perhaps, purposes quite different. However there may be retained in use by the new governing power some of the features or institutions of the government which has been supplanted, it is nevertheless wholly

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another government, and derives its life and all its vital qualities from a new source—the new sovereignty installed by the conquest. A conquest necessarily operates the extinguishment of the power of the party conquered in the country which is the subject of conquest, and the establishment there of the power of the conqueror. Without this there is no conquest of a country, and there can be none. When the power previously dominant in a country has been extinguished by that of another party, and rendered incapable of governing it further, and a new one has been established in its stead, it is both the right and the duty of the party thus coming into power to see to it that a government wholesome and salutary shall be established and administered, and, as in such a case there is only one power, that of the new party succeeding, capable of giving and administering the government, it follows that it is the duty as well as the right of that power to do it. No country can exist without a government of some kind. The rights of the inhabitants must be protected—crime must be restrained and punished—the virtuous must be protected against the vicious—the weak against the strong—order must be preserved and security to person and estate assured. The party dominant for the time being has the power to do it, and no one else has the power, and it follows from the necessity of the case that he must exercise it. So the government of the United States, having conquered and expelled from the territory or country, theretofore known as the state of Louisiana, the power by which the government of it had been theretofore administered, and having established there its own power, was bound by the laws of war, as well as the dictates of humanity, to give to the territory thus bereft a government in the place and stead of the one deposed or overthrown, such an one as should reasonably secure the safety and welfare of the people thus reduced to subjection; in some manner, not inconsistent, to be sure, with the proper interests of the governing power, and the maintenance of it in its supremacy there. The power established there was the military power of the United States, and the president of the United States, as we have seen, the commander-in-chief of the forces, military and naval, of the United States, was at the head of that power, and had the right and duty to exercise and direct it. It was incumbent on him, representing for this purpose the sovereignty of the United States, to see that the duty devolving on his government should be properly performed. He acted in obedience to this duty, and in accordance with this right, when he attempted to establish there a judicial tribunal capable of deciding controversies and administering justice.

* * * * * * *

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* * * The right, therefore, of a conqueror in a conquered country to ordain a system of government for it, and among other institutions to erect courts of justice, and maintain them in the discharge of their proper functions, is as well established and free from doubt when considered on authority, as it is in principle; and about as well in each as any proposition which could find among men an advocate to question it, could in the nature of things be expected to be.

* * * * * * *

My conclusions, therefore, are: That at the time of the establishment of the provisional court for Louisiana, a considerable part of the territory of that state was held by the forces of the United States, in armed belligerent occupation. That in a country so held, the authority of the occupying force is paramount, and necessarily operates to the exclusion of all other independent authority in it. That government from some source is a necessity, and while the power to give and administer government is exclusively with a party occupying a country, there can be no doubt that the right and the duty are his to furnish a government and supply that want. That the actual military occupation of that territory by the United States has continued from that time to the present, and still continues, and the right and duty of government, therefore, continue with the United States. That the establishment of the provisional court for Louisiana, by the president, as commander-in-chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations. * * *

Cross v. Harrison

United States Supreme Court, December Term, 1853

16 Howard 164

This was an action of assumpsit by Cross *et al* to recover from Harrison, appointed by the Military Governor of California, and acting as Collector of Customs at the port of San Francisco, for tonnage on vessels and duties on merchandise imported by plaintiffs into California and there landed.

The verdict and judgment were for Harrison in January, 1852. The case came up by writ of error from the Circuit Court of the United States for the Southern District of New York.

In the war with Mexico, the port of San Francisco was conquered by the arms of the United States, in the year 1846, and shortly afterwards the United States had military possession of all of Upper California. Early in 1847 the President of the United States, as Consti-

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tutional Commander-in-Chief of the Army and Navy, authorized the military and naval commanders of the United States forces in California to exercise the belligerent rights of a conqueror, and to form a civil and military government for the conquered territory, with power to impose duties on imports and tonnage for the support of such government, and of the army, which had the conquest in possession.

This was done, and tonnage and import duties were levied under a war tariff, which had been established by the civil government for that purpose, until official notice was received by the civil and military Governor of California, that a Treaty of Peace had been made with Mexico, by which Upper California had been ceded to the United States.

Upon receiving this intelligence, the governor directed that import and tonnage duties should thereafter be levied in conformity with such as were to be paid in the other ports of the United States by the Acts of Congress; and for such purpose he appointed the defendant in this suit, collector of the port of San Francisco.

The plaintiffs now seek to recover from him certain tonnage duties and imports upon foreign merchandise paid by them to the defendant as collector between the 3d of February, 1848 (the date of the Treaty of Peace), and the 13th of November, 1849 (when the collector appointed by the President, according to law, entered upon the duties of his office), upon the ground that they had been illegally exacted.

Mr. Justice Wayne. * * * The authority * * * given to the commander-in-chief of our naval force on that station, was, to establish port regulations, to prescribe the conditions upon which American and foreign vessels were to be admitted into the ports of California, and to regulate import duties. That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States. * * * We think it was a rightful and correct recognition under all the circumstances, and when we say rightful, we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California.

California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward the United States had military possession of all of Upper California. Early in 1847 the President, as Constitutional Commander-in-Chief of the Army and Navy, authorized the military and naval commander

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of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. * * * No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. * * *

The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded, in fact, to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them.

* * * The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union * * *.

* * * Our conclusion, from what has been said, is that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector * * *.

* * * We shall direct the judgment to be affirmed.

Order of President McKinley to the Secretary of War, July 18, 1898, on the Occupation of Santiago de Cuba by the American Forces

Correspondence Relating to War With Spain, I, 159; Moore, A Digest of International Law, VII, 261.

The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the province of Santiago and the occupation of

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the territory by the forces of the United States render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, cooperate with the United States in its efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and other officials connected with the administration of justice may if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American commander-in-chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

While the rule of conduct of the American commander-in-chief will be such as has just been defined, it will be his duty to adopt measures of a different kind if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native

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officials in part or altogether; to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the state he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats, belonging to the state, may be appropriated to his use, but, unless in case of military necessity, they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, and all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or works of science or art is prohibited, save when required by urgent military necessity.

Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not be retained.

While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expense of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.

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Private property taken for the use of the army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible receipts are to be given.

All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation.

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SECTION II

EXTENT OF MILITARY GOVERNMENT

(See FM 27–5, par. 13*b* and app. V, par. 14; and 27–10, pars. 283–285 and 293–296.)

UNITED STATES v. RICE

United States Supreme Court, 1819

4 Wheaton 246

Error to the Circuit Court of Massachusetts. This was an action of debt by the United States on a bond given to secure the payment of $7500 representing duties on goods imported into Castine, Maine, during the military occupancy of that port by British troops.

MR. JUSTICE STORY. The single question arising on the pleadings in this case is, whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. During this period the British government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy; and, upon the re-establishment of the American government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant, for the security of them.

Under these circumstances, we are all of opinion, that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer

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be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable at the time of importation is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

Judgment affirmed, with costs.

KEELY v. SANDERS

United States Supreme Court, October Term, 1878
99 U. S. 441

Error to the Supreme Court of Tennessee. This was a bill to quiet title obtained by a tax sale from the United States for failure to pay direct taxes. The land had been sold by a United States Commissioner in Memphis, June 24, 1864.

MR. JUSTICE STRONG. * * * One more [objection] only requires consideration. It is the averment that when the tax sale was made the military authority of the United States was not established in and over the county of Shelby, State of Tennessee * * *.

* * * * * * *

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* * * Whether the military authority had been established throughout Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government and not by the courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers.

That before the commissioners undertook to enforce the collection of the tax upon the lot in controversy, it had been determined by the executive that military authority had been established in the district, is plain enough. We know, historically, that the President had appointed a military governor of the entire State, and he was in active service as such. No other and civil authority existed. The commissioners themselves were executive officers, and their entering upon the duties of their office was an assumption that the military authority had been established throughout the district. The act of Congress required no express and formal determination that it had been so established, and therefore, whether it had or not, may be inferred from any executive action that assumed it had. Hence, opening an office for the collection of the tax, and proceeding to enforce collection, raised a presumption of the legality of the commissioners' action. The law presumes that persons acting in a public office have been duly appointed, and are acting with authority, until the contrary is shown. And it has been said that if officers of corporations openly exercise a power which presupposes a delegated authority for the purpose, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.

This is not all of the case in hand. Not only is the averment of the bill that the military authority of the United States was not established in the county of Shelby when the tax sale was made denied by the answer, but the averment is unsustained by proof. The city of Memphis, it is conceded, was in full and undisputed possession of the Federal army. All that is proved is that the military lines were around the city, at a distance of a mile or so from its corporate limits, and that the remaining part of the county was not in Federal occupation. All that is quite consistent with the fact that Federal military authority was established over the whole county. No conquering army occupies the entire territory conquered. Its authority is established when it occupies and holds securely the most important places, and when there is no opposing governmental authority within the territory. The inability of any other power to establish and maintain governmental authority therein is the test.

* * * * * * *

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The judgment of the Supreme Court of Tennessee will be reversed, and the record remitted with instructions to direct a dismissal of the bill; and it is

So ordered.

MR. JUSTICE FIELD dissented.

MACLEOD v. UNITED STATES

United States Supreme Court, 1913

229 U. S. 416

Appeal from the Court of Claims. Appellant, in business in Manila, sent a ship to Saigon, Indo-China, loaded it with rice, and carried the rice to Cebu, P. I., then in the possession of the Philippine republican government, where duties were exacted and paid. Upon the arrival thereafter of the ship at Manila the United States customs authorities demanded the payment of customs on the rice landed at Cebu. Payment was made under protest and suit brought to recover.

MR. JUSTICE DAY. When the Spanish fleet was destroyed at Manila, May 1, 1898, it became apparent that the Government of the United States might be required to take the necessary steps to make provision for the government and control of such part of the Philippines as might come into the military occupation of the forces of the United States. The right to thus occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. Such was the course of the Government with respect to the territory acquired by conquest and afterwards ceded by the Mexican Government to the United States. * * *

There has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise governmental authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least. * * * What should constitute military occupation was one of the matters before The Hague Convention in 1899 respecting laws and customs of war on land, and the following articles were adopted by the nations giving adherence to that Convention, among which is the United States (32 Stat. II, 1821):

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"Article XLII. Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation applies only to the territory where such authority is established, and in a position to assert itself.

"Article XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reestablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

* * * * * * *

The statement of the facts shows that the insurgent government was in actual possession of the custom-house at Cebu, with power to enforce the collection of duties there, as it did. Such government was of the class of *de facto* governments described in 1 Moore's International Law Digest, section 20, as follows:

"But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories, and against the rightful authority of an established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force."

The attitude of this Government toward such *de facto* governments was evidenced in the Bluefields case, a full account of which is given in 1 Moore's International Law Digest, pp. 49 *et seq.* In that case General Reyes had headed an insurrectionary movement at Bluefields and acquired actual control of the Mosquito Territory in Nicaragua. His control continued for a short time only, February 3 to February 25, 1899, and after the reëstablishment of the Nicaraguan Government at Bluefields it demanded of American merchants the payment to it of certain amounts of duty which they had been compelled to pay to the insurgent authorities during the period of their *de facto* control. The American Government remonstrated, and the duties demanded by the Nicaraguan Government were by agreement deposited in the British consulate pending a settlement of the controversy. The Department of State of the United States, upon receiving sworn state-

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ments of the American merchants to the effect that they were not accomplices of Reyes, that the money actually exacted was the amount due on bonds which then matured for duties levied in December, 1898, payments being made to the agent of the titular government who was continued in office by General Reyes, that payment was demanded under threat of suspension of importations, and that from February 3 to February 25 General Reyes was in full control of the civil and military agencies in the district, expressed the opinion that to exact the second payment would be an act of international injustice; and the money was finally returned to the American merchants with the assent of the Government of Nicaragua.

A similar case appears in 1 Moore's International Digest, p. 49, in which our Government was requested by Great Britain to use its good offices to prevent the exaction by the Mexican Government of certain duties at Mazatlan, which had been previously paid to insurgents. The then Secretary of State, Mr. Fish, instructed our Minister to Mexico as follows:

"It is difficult to understand upon what ground of equity or public law such duties can be claimed. The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. The pretension is analogous to that upon which vessels have been captured and condemned upon a charge of violating a blockade of a port set on foot by a proclamation only, without force to carry it into effect."

While differing somewhat in its circumstances, the case of *United States* v. *Rice*, 4 Wheat. 246, is an instructive case. * * *

* * * * * * *

* * * The tariff duties upon the cargo of rice here in question were paid to the *de facto* authorities at Cebu, where the cargo was entered, and the payment made at Manila was not a tariff duty but an illegal and unwarranted exaction in the nature of a penalty, covered by neither the orders of the President nor the ratifying acts of Congress.

We think the Court of Claims was in error in holding the duties collectible at Manila under the circumstances related * * *. Its judgment will therefore be reversed and the case remanded to the Court of Claims with instructions to enter judgment for the claimant.

Reversed.

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SECTION III

POWERS OF THE MILITARY GOVERNOR

(See FM 27–5, pars. 9*a* and 10*a*; and 27–10, pars. 24*c* and *d* and 323–333.)

MITCHELL v. HARMONY

United States Supreme Court, December Term, 1851
13 Howard 115

Writ of error from the Circuit Court of the United States for the Southern District of New York. This was an action of trespass by Manuel X. Harmony (a native of Spain but a naturalized citizen of the United States) against Lieutenant Colonel Mitchell, to recover the value of property seized by him in the province of Chihuahua during the war with Mexico.

Harmony was a trader who, with his wagons of goods, had been permitted to follow General Kearney to Santa Fe. Subsequently General Kearney proceeded to California, and the command in New Mexico devolved upon Colonel Doniphan, who was joined by Lieutenant Colonel Mitchell.

When Colonel Doniphan commenced his march on Chihuahua, the plaintiff and other traders were permitted to follow the army and trade with the inhabitants of the occupied territory. When the army had arrived at San Elisario, however, Harmony decided to proceed no further and to leave the army. At the command of Colonel Doniphan, Colonel Mitchell compelled him nevertheless to go forward. As a result of accompanying the army under this compulsion much of Harmony's property was subsequently captured by the Mexicans.

It was in respect of this loss that the action was brought.

Though the alleged trespass was committed out of the limits of the United States, the right of action was transitory and could be sued upon in this country.

The trial judge charged the jury in part as follows:

"Another ground taken by the defendant, and relied upon, depends upon another principle of public law, viz., the taking possession of

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the goods at a time and place when it was necessary for the purpose of preventing them from falling into the hands of the enemy. * * * Taking the whole of the evidence together, and giving full effect to every part of it, we think this branch of the defence has also failed. No case of peril or danger has been proved which would lay a foundation for taking possession of the goods of the plaintiff. * * *"

The jury evidently took that view of the facts, and found for the plaintiff.

MR. CHIEF JUSTICE TANEY. * * * It is admitted that the plaintiff, against his will, was compelled by the defendant to accompany the troops with the property in question when they marched from San Elisario to Chihuahua; and that he was informed that force would be used if he refused. This was unquestionably a taking of the property, by force, from the possession and control of the plaintiff; and a trespass on the part of the defendant, unless he can show legal grounds of justification.

He justified the seizure on several grounds.

1. That the plaintiff was engaged in trading with the enemy.

2. That he was compelled to remain with the American forces, and to move with them, to prevent the property from falling into the hands of the enemy.

3. That the property was taken for public use.

4. That if the defendant was liable for the original taking, he was released from damages for its subsequent loss, by the act of the plaintiff, who had resumed the possession and control of it before the loss happened.

5. That the defendant acted in obedience to the order of his commanding officer, and therefore is not liable.

The first objection was overruled by the court, and we think correctly.

There is no dispute about the facts which relate to this part of the case, nor any contradiction in the testimony. The plaintiff entered the hostile country openly for the purpose of trading, in company with other traders, and under the protection of the American flag. The inhabitants with whom he traded had submitted to the American arms, and the country was in possession of the military authorities of the United States. The trade in which he was engaged was not only sanctioned by the commander of the American troops, but, as appears by the record, was permitted by the Executive Department of the government, whose policy it was to conciliate, by kindness and commercial intercourse, the Mexican provinces bordering on the United States, and by that means weaken the power of the hostile government of

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Mexico, with which we were at war. It was one of the means resorted to to bring the war to a successful conclusion.

It is certainly true, as a general rule, that no citizen can lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done.

Indeed this ground of justification has not been pressed in the argument. The defence has been placed, rather on rumors which reached the commanding officer and suspicions which he appears to have entertained of a secret design in the plaintiff to leave the American forces and carry on an illicit trade with the enemy, injurious to the interests of the United States. And if such a design had been shown, and that he was preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified. But there is no evidence in the record tending to show that these rumors and suspicions had any foundation. And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence.

The 2d and 3d objections will be considered together, as they depend on the same principles. Upon these two grounds of defence the Circuit Court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.

In the argument of these two points, the circumstances under which the goods of the plaintiff were taken have been much discussed, and the evidence examined for the purpose of showing the nature and character of the danger which actually existed at the time or was apprehended by the commander of the American forces. But this question is not before us. It is a question of fact upon which the jury have passed, and their verdict has decided that a danger or necessity, such as the court described, did not exist when the property of the plaintiff was taken by the defendant. And the only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether any thing short of an immediate and impending

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danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public.

The instruction is objected to on the ground, that it restricts the power of the officer within narrower limits than the law will justify. And that when the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should adopt; and if he acts honestly, and to the best of his judgment, the law will protect him. But it must be remembered that the question here, is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is

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justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.

* * * * * * *

The 4th ground of objection is equally untenable. The liability of the defendant attached the moment the goods were seized, and the jury have found that the plaintiff did not afterwards resume the ownership and possession.

Indeed, we do not see any evidence in the record from which the jury could have found otherwise. From the moment they were taken possession of at San Elisario, they were under the control of Colonel Doniphan, and held subject to his order. They were no longer in the possession or control of the plaintiff, and the loss which happened was the immediate and necessary consequence of the coercion which compelled him to accompany the troops.

It is true, the plaintiff remained with his goods and took care of them, as far as he could, during the march. But whatever he did in that respect was by the orders or permission of the military authorities. He had no independent control over them.

Neither can his efforts to save them from loss, after they arrived at the town of Chihuahua, by sale or otherwise, be construed into a resumption of possession, so as to discharge the defendant from liability. He had been brought there with the property against his will; and his goods were subjected to the danger in which they were placed by the act of the defendant. And the defendant cannot discharge himself from the immediate and necessary consequences of his wrongful act, by abandoning all care and control of the property after it reached Chihuahua, and leaving the plaintiff to his own efforts to save it. He could not discharge himself without restoring the possession in a place of safety; or in a place where the plaintiff was willing to accept it. And the plaintiff constantly refused to take the risk upon himself, after they arrived at Chihuahua, as well as on the march, and warned Colonel Doniphan that he would not.

Neither can the permission given to the plaintiff to leave the troops and go to the hacienda of Parns, affect his rights. He was then in the midst of the enemy's country, and to leave the American forces at

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that point might have subjected his person and property to greater dangers than he incurred by remaining with them. The plaintiff was not bound to take upon himself any of the perils which were the immediate consequences of the original wrong committed by the defendant in seizing his property and compelling him to proceed with it and accompany the troops.

The 5th point may be disposed of in a few words. If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.

But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belonged to an officer of inferior grade.

We do not understand that any objection is taken to the jurisdiction of the Circuit Court over the matters in controversy. The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the Circuit Court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States. The subject was before this court in the case of *McKenna* v. *Fisk*, reported in 1 How., 241, where the decisions upon the question are referred to, and the jurisdiction in cases of this description maintained.

Upon the whole, therefore, it is the opinion of this court, that there is no error in the instructions given by the Circuit Court, and that the judgment must be affirmed with costs.

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UNITED STATES v. RUSSELL

United States Supreme Court, December Term, 1871

13 Wallace 623

Appeal from the Court of Claims. Russell sued in the Court of Claims for compensation for the use of three steamers belonging to him. The record showed that they had been taken by quartermasters for use as transports on the Mississippi River, under claim of "imperative military necessity" during the Civil War.

Counsel for the United States contended that the Court of Claims had not been given jurisdiction under the statutes over this type of claim.

MR. JUSTICE CLIFFORD. Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and impera-

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tive, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner.

Three steamboats, owned by the appellee, during the rebellion, were employed as transports in the public service for the respective periods mentioned in the record, without any agreement fixing the compensation to which the owner should be entitled. Certain payments for the services were made in each case by the government to the owner, but he claimed a larger sum, and the demand being refused he instituted the present suit. Prior to the orders hereinafter mentioned the steamboats were employed by the owner in carrying private freights, and the findings of the court below show that he quit that employment in each case and went into the public service in obedience to the military order of an assistant quartermaster of the army. Reference to one of the orders will be sufficient, as the others are not substantially different. Take the second, for example, which reads as follows, as reported in the transcript: "Imperative military necessity requires the services of your steamer for a brief period; your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing." Pursuant to that order, or one of similar import in substance and effect, the respective steamboats were impressed into the public service and employed as transports for carrying government freight for the several periods of time set forth in the findings of the court. Throughout the whole time the steamboats were so employed in the military service they were in command of the owner as master, or of some one employed by him and under his pay and control, and the findings of the court show that he manned and victualled the steamboats and paid all the running expenses during the whole period they were so employed. Unexplained and uncontradicted the findings of the court show a state of facts which plainly lead to the conclusion that the emergency was such that it justified the officers in each case in ordering the steamboat into the service of the United States, as the orders purport to have been issued from an imperative military necessity, and if so they show beyond all doubt that the officers who issued them were not trespassers, and that the government of the

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United States is bound to make full compensation to the owner for the services rendered.

Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.

Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law.

Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the executive department, and not to the Court of Claims.

Jurisdiction is vested in the Court of Claims, by the act of Congress establishing the court, to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, which may be suggested to it by a petition regularly filed in the court. Express authority, therefore, is given to the court by that act to hear and determine claims founded upon a contract with the government of the United States, whether express or implied. * * *

* * * Viewed in that light, the case is free from all difficulty, as the jurisdiction of the court, by the express words of the act of Con-

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gress, extends to claims founded upon an implied contract as well as upon that which is express.

* * * * * * *

Decree affirmed.

Mrs. Alexander's Cotton

United States Supreme Court, December Term, 1864

2 Wallace 404

Appeal from the Circuit Court of the United States for the Southern District of Illinois. The controversy concerned 72 bales of cotton captured in May 1864, on the plantation of Mrs. Elizabeth Alexander, on the Red River, in Louisiana. The army of General Banks and a naval force under Admiral Porter advanced to occupy the district, which they held until, after rather less than eight weeks, they were compelled by the Confederates to retire. During this temporary occupation Mrs. Alexander's cotton was captured. Proceedings to condemn the property were brought, and *pendente lite* the cotton was sold. Mrs. Alexander claimed the proceeds and the District Court made a decree in her favor, which the Circuit Court confirmed. The United States appealed.

Mr. Chief Justice Chase. * * * After the seizure of the cotton, Mrs. Alexander took the oath required by the President's proclamation of amnesty. The evidence in relation to her previous personal loyalty is somewhat conflicting. She had furnished mules and slaves, involuntarily as alleged, to aid in the construction of the rebel Fort De Russy. She now remains in the rebel territory. Before the retreat of the Union troops, elections are stated to have been held, under military auspices, for delegates to a constitutional convention about to meet in New Orleans.

* * * * * * *

There can be no doubt, we think, that it was enemies' property. The military occupation by the national military forces was too limited, too imperfect, too brief, and too precarious to change the enemy relation created for the country and its inhabitants by three years of continuous rebellion; interrupted, at last, for a few weeks; but immediately renewed, and ever since maintained. The Parish of Avoyelles, which included the cotton plantation of Mrs. Alexander, included also Fort De Russy, constructed in part by labor from the plantation. The rebels reoccupied the fort as soon as it was evacuated by the Union troops, and have since kept possession.

It is said, that though remaining in rebel territory, Mrs. Alexander

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has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.

We attach no importance, under the circumstances, to the elections said to have been held for delegates to the constitutional convention.

Being enemies' property, the cotton was liable to capture and confiscation by the adverse party. It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted "to special cases dictated by the necessary operation of the war," (1 Kent 92) and as excluding, in general, "the seizure of the private property of pacific persons for the sake of gain." (Id. 93) The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies.

In the case before us, the capture seems to have been justified by the peculiar character of the property and by legislation. It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history, that rather than permit it to come into the possession of the national troops, the rebel government has everywhere devoted it, however owned, to destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars. It is in the record before us, that on this very plantation of Mrs. Alexander, one year's crop was destroyed in apprehension of an advance of the Union forces. The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion.

And the capture was justified by legislation as well as by public policy. The act of Congress to confiscate property used for insur-

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rectionary purposes, approved August 6th, 1861, declares all property employed in aid of the rebellion, with consent of the owners, to be lawful subject of prize and capture wherever found. And it further provided, by the act to suppress insurrection, and for other purposes, approved July 17, 1862, that the property of persons who had aided the rebellion, and should not return to allegiance after the President's warning, should be seized and confiscated. It is in evidence that Mrs. Alexander was a rebel enemy at the time of the enactment of this act; that she contributed to the erection of Fort De Russy, after the passage of the act of July, 1862, and so comes within the spirit, if not within the letter, of the provisions of both.

* * * * * * *

As a case of lawfully captured property, not for the benefit of captors, its disposition is controlled by the laws relating to such property. By these laws and the orders under them, all officers, military and naval, and all soldiers and sailors, are strictly enjoined, under severe penalties, to turn over any such property which may come to their possession to the agents of the Treasury Department, and these agents are required to sell all such property to the best advantage, and pay the proceeds into the National Treasury. Any claimant of the property may, at any time within two years after the suppression of the rebellion, bring suit in the Court of Claims, and on proof of ownership of the property, or of title to the proceeds, and that the claimant has never given aid or comfort to the rebellion, have a decree for the proceeds, deducting lawful charges. In this war, by this liberal and beneficent legislation, a distinction is made between those whom the rule of international law classes as enemies. All, who have in fact maintained a loyal adhesion to the Union, are protected in their rights to captured as well as abandoned property.

* * * * * * *

We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agents of the Treasury Department, to be disposed of under the act of March 12th, 1863. Not having been so turned over, but having been sold by order of the District Court, its proceeds should now be paid into the Treasury of the United States, in order that the claimant, when the rebellion is suppressed, or she has been able to leave the rebel region, may have the opportunity to bring her suit in the Court of Claims, and, on making the proof required by the act, have the proper decree.

The decree of the District Court is reversed, and the cause remanded, with directions to

Dismiss the libel.

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Note on *Mrs. Alexander's Cotton*

Prepared in the Judge Advocate General's Office

It is a fundamental principle of constitutional law, as enunciated by Mr. Justice Clifford in *United States* v. *Russell* (13 Wall. 623), that private property may not be taken for public use without just compensation. This principle is also recognized in international law, as follows: "Private property * * * must be respected" (Regulations annexed to Hague Convention No. IV of Oct. 18, 1907, art. 46, par. 1), and "Private property cannot be confiscated" (id., art. 46, par. 2). Justice Clifford in the same case says, however, that "in time of war or of immediate and impending public danger * * * private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner". Mr. Chief Justice Chase applies this doctrine to cotton in Mrs. Alexander's Cotton (2 Wall. 404), as follows: "It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe". Mr. Chief Justice Waite explained more fully the reason for the rule in *Lamar, Executor* v. *Browne* (92 U. S. 187):

> "That cotton, though private property, was a legitimate subject of capture, is no longer an open question in this court. *U. S.* v. *Anderson*, 2 Wall. 404, *U. S.* v. *Padelford*, 9 Wall. 540; *Haycraft* v. *U. S.*, 22 Wall. 81. It was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. * * * To a very large extent it furnished the munitions of war, and kept the forces in the field. It was, therefore, hostile property, and legitimately the subject of capture in the territory of the enemy."

Lamar, Executor v. Browne

United States Supreme Court, October Term, 1875

92 U. S. 187

Error to the Circuit Court of the United States for the District of Massachusetts.

Mr. Chief Justice Waite. This was an action of trover, brought by Lamar, the plaintiff, to recover of the defendants the value of eighteen hundred bales of cotton alleged to have been taken and converted by them. The defendants justified, as agents of the United States to receive and collect abandoned and captured property, under the several acts of Congress providing therefor. * * *

* * * * * * *

Property is captured on land when seized or taken from hostile possession by the military forces under orders from a commanding officer. The testimony of Kimball shows conclusively that the cotton in ques-

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tion was seized by the military forces of the United States, in obedience to the orders of a commanding general. This is not seriously disputed; but it is contended, that, when seized, it was not in "hostile possession," and that, in consequence, the seizure, though made by the military, did not amount to a capture. It is true, as claimed, that, when the seizure was made, active hostilities in Georgia had entirely ceased. The last organized army of the rebellion east of the Mississippi had surrendered almost two months before, and a very large portion of the national forces had been disbanded. The blockade had been raised, and trade and commercial intercourse in that part of the insurgent territory again authorized, but still, in fact, a state of war existed. That continued until April 2, 1866 (*The Protector*, 12 Wall. 702); the territory within the limits of the State of Georgia being occupied by the national forces, and actually governed by means of that occupation.

From time to time during the war the military lines of the enemy were forced back; and, as they receded, the hostile territory was entered upon by the forces of the United States. It was thus taken out of hostile possession. Whenever, therefore, during this military occupation, enemy property found on the recovered territory was seized by the military forces, in obedience to orders, it was taken from hostile possession within the meaning of that term as used in respect to captures. Property taken on a field of battle is not usually collected until after resistance has ceased; but it is none the less on that account captured property. The larger the field, the longer the time necessary to make the collection. By the battle, the enemy has been compelled to let go his possession; and the conqueror may proceed with the collection of all hostile property thus brought within his reach, so long as he holds the field. At the time this transaction occurred, the military lines of the enemy east of the Mississippi had been broken up, and its armies in that locality disbanded. Thus the whole of this insurgent territory was uncovered, and this part of the field of the battles of the entire war taken from the hostile possession of the enemy. It was at once occupied by the national forces; and they proceeded immediately to secure the results of the prolonged and stubborn conflict.

That cotton, though private property, was a legitimate subject of capture, is no longer an open question in this court. *U. S.* v. *Anderson*, 2 Wall. 404; *U. S.* v. *Padelford*, 9 Wall. 540; *Haycraft* v. *U. S.*, 22 Wall. 81. It was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners, it was subject to forced contributions in aid of the common cause. Its exportation through the blockade was a public necessity. Importing

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and exporting companies were formed for that purpose. It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton, they would not have had, after the first year or two, the means to support the war. To a very large extent it furnished the munitions of war, and kept the forces in the field. It was, therefore, hostile property, and legitimately the subject of capture in the territory of the enemy.

For the purposes of capture, property found in enemy territory is enemy property, without regard to the *status* of the owner. In war, all residents of enemy country are enemies. Knowing this, but bearing in mind "the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war" (*Klein's Case*, 13 Wall. 137), Congress passed the abandoned and captured property acts. The capture of hostile property was in this way authorized by the United States, even though it should be owned by private persons. The military authorities were permitted to make their seizures; but careful provision was made for the collection of the property seized, its conversion into money to be deposited in the national treasury, there to remain, according to the ruling in *Klein's* Case, in trust "for those who were by that act declared entitled to the proceeds." Capture for private gain was not permitted. All went to the government.

* * * * * * *

It was in this spirit that the Abandoned and Captured Property Act was passed. It gave the Court of Claims authority to adjudicate between the belligerent sovereign and the citizen, and to determine the question of capture or no capture. If the owner or claimant appearing there had been loyal, and his suit was commenced in time, he was entitled to a judgment restoring him to the possession of that which represented his property in the national treasury.

* * * * * * *

Judgment affirmed.

Mr. Justice Field dissenting.

United States v. Diekelman

United States Supreme Court, October Term, 1875

92 U. S. 520

Appeal from the Court of Claims.

Mr. Chief Justice Waite delivered the opinion of the court.

This suit was brought in the Court of Claims under the authority of

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a joint resolution of both Houses of Congress, passed May 4, 1870, as follows:

"That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an alleged detention of the ship 'Essex' by the military authorities of the United States at New Orleans, in the month of September, 1862, be and is hereby referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found to be entitled to any damages."

Before this resolution was passed, the matter of the claim had been the subject of diplomatic correspondence between the governments of the United States and Prussia.

The following article, originally adopted in the treaty of peace between the United States and Prussia, concluded July 11, 1799 (8 Stat. 168), and revived by the treaty concluded May 1, 1828 (8 Stat. 384), was in force when the acts complained of occurred, to wit:—

"Art. XIII. And in the same case, if one of the contracting parties, being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage."

When the "Essex" visited New Orleans, the United States were engaged in the war of the rebellion. The port of that city was, at the very commencement of the war, placed under blockade, and closed against trade and commercial intercourse; but, on the 12th of May, 1862, the President, having become satisfied that the blockade might "be safely relaxed with advantage to the interests of commerce,"

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issued his proclamation, to the effect that from and after June 1 "commercial intercourse, . . . except as to persons, things, and information contraband of war," might "be carried on subject to the laws of the United States, and to the limitations, and in pursuance of the regulations . . . prescribed by the Secretary of the Treasury," and appended to the proclamation. These regulations, so far as they are applicable to the present case, are as follows:—

"1. To vessels clearing from foreign ports and destined to . . . New Orleans, . . . licenses will be granted by consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war either to or from the said ports; which licenses shall be exhibited to the collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade; and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs according to law, showing no violation of the conditions of the license." 12 Stat. 1264.

The "Essex" sailed from Liverpool for New Orleans June 19, 1862, and arrived Aug. 24. New Orleans was then in possession of the military forces of the United States, with General Butler in command. The city was practically in a state of siege by land, but open by sea, and was under martial law.

The commanding general was expressly enjoined by the government of the United States to take measures that no supplies went out of the port which could afford aid to the rebellion; and, pursuant to this injunction, he issued orders in respect to the exportation of money, goods, or property, on account of any person known to be friendly to the Confederacy, and directed the custom-house officers to inform him whenever an attempt was made to send any thing out which might be the subject of investigation in that behalf.

In the early part of September, 1862, General Butler, being still in command, was informed that a large quantity of clothing had been bought in Belgium on account of the Confederate government, and was lying at Matamoras awaiting delivery, because that government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to a half million more, was delayed in Belgium from coming forward, because of the non-payment of the first shipment. He was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; and this information afterwards proved to be correct.

He was also informed early in September by the custom-house officers, that large quantities of silver-plate and bullion were being shipped on the "Essex," then loading for a foreign port, by persons,

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one of whom had declared himself an enemy of the United States, and none of whom would enroll themselves as friends; and he thereupon gave directions that the specified articles should be detained, and their exportation not allowed until further orders.

On the 15th September, the loading of the vessel having been completed, the master applied to the collector of the port for his clearance, which was refused in consequence of the orders of General Butler, but without any reasons being assigned by the collector. The next day, he was informed, however, that his ship would not be cleared unless certain specified articles which she had on board were taken out and landed. Much correspondence ensued between General Butler and the Prussian consul at New Orleans in reference to the clearance, in which it was distinctly stated by General Butler that the clearance would not be granted until the specified goods were landed, and that it would be granted as soon as this should be done. Almost daily interviews took place between the master of the vessel and the collector, in which the same statements were made by the collector. The master refused to land the cargo, except upon the return of his bills of lading. Some of these bills were returned, and the property surrendered to the shipper. In another case, the shipper gave an order upon the master for his goods, and they were taken away by force. At a very early stage in the proceeding, the master and the Prussian consul were informed that the objection to the shipment of the articles complained of was that they were contraband.

A part only of the goods having been taken out of the vessel, a clearance was granted her on the 6th of October, and she was permitted to leave the port and commence her voyage.

Upon this state of facts, the Court of Claims gave judgment for Diekelman, from which the United States took an appeal.

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to

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arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

In this case Diekelman, claiming to have been injured by the alleged wrongful conduct of the military forces of the United States, made his claim known to his government. It was taken into consideration, and became the subject of diplomatic correspondence between the two nations. Subsequently, Congress, by joint resolution, referred the matter to the Court of Claims "for its decision according to law." The courts of the United States were thus opened to Diekelman for this proceeding. In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all the circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf. This requires us, as we think, to consider the rights of the claimant under the treaty between the two governments, as well as under the general law of nations. For all the purposes of its decision, the case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two governments have agreed might be instituted for that purpose. We shall proceed upon that hypothesis.

1. As to the general law of nations.

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty. *The Exchange* v. *McFaddon*, 7 Cranch, 116. When the "Essex" sailed from Liverpool, the United States were engaged in war. The proclamation under which she was permitted to visit New Orleans made it a condition of her entry that she should not take out goods contraband of war, and that she should not leave until cleared by the collector of customs according to law. Previous to June 1 she was excluded altogether from the port by the blockade. At that date the blockade was not removed, but relaxed only in the interests of commerce. The war still remained paramount, and commercial intercourse subordinate only. When the "Essex" availed herself of the proclamation and entered the port, she assented to the conditions imposed, and cannot complain if she was detained on account of the necessity of enforcing her obligations thus assumed.

The law by which the city and port were governed was martial law. This ought to have been expected by Diekelman when he despatched his vessel from Liverpool. The place had been wrested from the pos-

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session of the enemy only a few days before the issue of the proclamation, after a long and desperate struggle. It was, in fact, a garrisoned city, held as an outpost of the Union army, and closely besieged by land. So long as it remained in the possession of the insurgents, it was to them an important blockade-running point, and after its capture the inhabitants were largely in sympathy with the rebellion. The situation was, therefore, one requiring the most active vigilance on the part of the general in command. He was especially required to see that the relaxation of the blockade was not taken advantage of by the hostile inhabitants to promote the interests of the enemy. All this was matter of public notoriety; and Diekelman ought to have known, if he did not in fact know, that although the United States had to some extent opened the port in the interests of commerce, they kept it closed to the extent that was necessary for the vgiorous prosecution of the war. When he entered the port, therefore, with his vessel, under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens, operated equally upon him. Citizens were governed by martial law. It was his duty to submit to the same authority.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law, and necessarily so. His first great duty was to maintain on land the blockade which had theretofore been kept up by sea. The partial opening of the port toward the sea, made it all the more important that he should bind close the military lines on the shore which he held.

To this law and this government the "Essex" subjected herself when she came into port. She went there for gain, and voluntarily assumed all the chances of the war into whose presence she came. By availing herself of the privileges granted by the proclamation, she, in effect, covenanted not to take out of the port "persons, things, or information contraband of war." What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but, when destined for hostile use or to procure hostile supplies, they do. Whether they are so or not, under the circumstances of a particular case, must be determined by some one when a necessity for action occurs. At New Orleans, when this transaction took place, this duty fell upon the general in command. Military commanders must act to a

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great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding. Vigilance is the law of their duty. The success of their operations depends to a great extent upon their watchfulness.

General Butler found on board this vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended for use to promote the rebellion. It was his duty, therefore, under his express instructions, to see that the vessel was not cleared with these articles on board; and he gave orders accordingly. It matters not now whether the property suspected was in fact contraband or not. It is sufficient for us that he had reason to believe, and in fact did believe, it to be contraband. No attempt has been made to show that he was not acting in good faith. On the contrary, it is apparent, from the finding of the court below, that the existing facts brought to his knowledge were such as to require his prompt and vigorous action in the presence of the imminent danger with which he was surrounded. Certainly enough is shown to make it necessary for this plaintiff to prove the innocent character of the property before he can call upon the United States to respond to him in damages for the conduct of their military commander, upon whose vigilance they relied for safety.

Believing, then, as General Butler did, that the property was contraband, it was his duty to order it out of the ship, and to withhold her clearance until his order was complied with. He was under no obligation to return the bills of lading. The vessel was bound not to take out any contraband cargo. She took all the risks of this obligation when she assumed it, and should have protected herself in her contracts with shippers against the contingency of being required to unload after the goods were on board. If she failed in this, the consequences are upon her, and not the United States. She was operating in the face of war, the chances of which might involve her and her cargo in new complications. She voluntarily assumed the risks of her hazardous enterprise, and must sustain the losses that follow.

Neither does it affect the case adversely to the United States that the property had gone on board without objection from the custom-house officers or the military authorities. It is not shown that its character was known to General Butler or the officers of the custom-house before it was loaded. The engagement of the vessel was not to leave until she had been cleared according to law, and that her clearance might be withheld until with reasonable diligence it could be ascertained that she had no contraband property on board. This is the legitimate effect of the provisions of the treasury regulations, entitling her to a license "upon satisfactory evidence" that she would

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"convey no persons, property, or information contraband of war, either to or from" the port; and requiring her not to leave until she had "a clearance from the collector of customs, according to law, showing no violation of the license." Her entry into the port was granted as a favor, not as a right, except upon the condition of assent to the terms imposed. If the collector of customs was to certify that the license she held had not been violated, it was his duty to inquire as to the facts before he made the certificate. Every opportunity for the prosecution of this inquiry must be given. Under the circumstances, the closest scrutiny was necessary. If, upon the examination preliminary to the clearance, prohibited articles were found on board, there could be no certificate such as was required, until their removal. It would then be for the vessel to determine whether she would remove the goods and take the clearance, or hold the goods and wait for some relaxation of the rules which detained her in port as long as she had them on board. General Butler only insisted upon her remaining until she removed the property. She elected to remain. There was no time when her clearance would not have been granted if the suspected articles were unloaded.

We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

2. As to the treaty.

The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the waters of the United States while an impending war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained after her voyage had been actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no provision of the treaties in force between the two governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations.

* * * * * * *

As we view the case, the claimant is not "entitled to any damages" as against the United States, either under the treaty with Prussia or by the general law of nations.

The judgment of the Court of Claims is, therefore, reversed, and the cause remanded with directions to dismiss the petition.

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SECTION IV

POWERS OF THE MILITARY GOVERNOR WITH RESPECT TO POLITICAL INSTITUTIONS

(See FM 27–5, pars. 10, 24, 25, and 32; and 27–10, pars. 6, 271, and 312.)

STATE EX REL. KAIN v. HALL

Supreme Court of Tennessee, 1873

6 Baxter (65 Tenn.) 3

Appeal from the Circuit Court at Knoxville and petition for mandamus to compel the judge of that court to proceed with the trial of the cause. During the Civil War an action of ejectment was brought against Kain and was tried by Judge Hall, a circuit judge appointed by Andrew Johnson, then military governor of Tennessee. Relator was absent and was not represented by counsel; judgment went against him and he lost possession of his property. In 1873 relator moved in the circuit court (held by the same Judge Hall, now holding a regular commission from the State of Tennessee) that he be permitted to take steps for the revivor of the action of ejectment. From a denial of this motion relator appealed.

SNEED, JUDGE. * * * It is argued with very great ability that the court or tribunal over which the defendant presided when this judgment was rendered, was no court at all, and that the defendant was not either *de jure* or *de facto* a Judge of the Circuit Court. This is certainly so in the sense of that system of laws, organic and derivative, under which we now live, and under which we would have been living on the 10th of October, 1864, if that had been a season of profound peace instead of flagrant war. But a state of war unsettles the foundations of the social fabric, and paralyzes the law, and the will of a conqueror becomes a law unto itself. There can be no question, at this day, that the conquering power in the possession of the conquered territory has a right either to adopt the tribunals of

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justice already existing, or to abolish them and create others in their stead. Thus, it is said, the laws, usages and municipal regulations in force at the time of the conquest, remain in force until changed by the new sovereign: Calvin Case, 7 Coke, 17; 9 Pet., 711. There is no doubt of his power to change the laws of the conquered country, unless restrained by the capitulation or treaty. In the case of a country acquired by conquest, said Chancellor Walworth, no formal act of legislation is necessary to change the law; the mere will of the conqueror is enough: 17 Wend., 587; 1 Kent's Commen., 181. We need not multiply authorities upon this familiar principle of the laws of war. It is a principle quite as old as the law of nations that the conquering power may create tribunals, to endure during the hostile occupation, to try civil and criminal causes, and to protect for the time the rights of life and property: Watt M., 782, 783. And these principles applied with peculiar force to the late civil war in this country. The theory was, that it was necessary that the State governments should be in active operation, in conformity with and subordinate to the Constitution of the United States, for the administration of the internal affairs of each State. Until this was so, the country held under the forcible or military government of the republic as far as necessary, although that government is exercised by civil officers and civil methods: Wheat. Inter. Law, 85. And it makes no difference what these tribunals are called—whether circuit courts or civil commissions—so that they be constituted by competent military authority. This court has recently said that the civil commissions appointed by Andrew Johnson in West Tennessee for the trial of civil causes, under his commission from the President as commander-in-chief of the army, were, under the laws of war, valid organizations, and that these judgments could not be impeached on the ground that the military governor had no power to constitute them: Wart v. Thompson, MS., Jackson, 1872. Although this was said *arguendo*, and could not technically be considered as a binding authority, yet it was said upon due consideration in a case involving a general review of the subject of military tribunals in a time of war. As unpalatable as such a doctrine must be in this country, where liberty regulated by law has been the rule, and arbitrary restraint the exception, yet, under the laws of war, we must accept it as true. Those tribunals have in divers ways been recognized by the court, and treated as lawfully constituted tribunals. And if for no other reason, this ought to be so upon consideration of public policy, and for the sake of public repose. We have had before us in this court many important causes where judges, having no other ensign of office than a commission of the military governor in time of war, rendered judgments which we have reversed

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or affirmed duly recognizing these persons as *de facto* judges. Our immediate predecessors upon this bench set a commendable example in suffering many things done during the war, which were by them deemed unlawful, to remain in absolute repose because they were "accomplished facts." Following this example and for the same reasons, among others herein stated, we cannot and will not disturb the public repose, unsettle titles, and bring our social fabric into chaos and confusion, by pronouncing as an unlawful usurpation the exercise of judicial functions which, under the laws of war, were lawful at the time.

Dismiss the petition.

CRONIN v. PATRICK COUNTY

United States Circuit Court, Western District of Virginia, 1882

4 Hughes 524, 89 Fed. 79

This was an action at law by Cronin against the County of Patrick, Virginia, to recover interest on two county bonds. There was a plea of *non est factum*. One of the principal points raised for the defense was that the magistrates who ordered the vote of the people authorizing the issuance of the bonds were appointed by the military commandant of Virginia, and not magistrates commissioned under state authority, and according to state laws.

HUGHES, DISTRICT JUDGE. I do not think the points relied upon by defendant in support of the plea of *non est factum* can be sustained. The military government of Virginia during the years 1867, 1868, and 1869 was a *de facto* government, whose acts have been recognized as authoritative in all matters of general administration ever since; and the magistrates appointed by General Canby as commandant of the district were as competent to act for the counties in which they presided as their predecessors had been. Their acts must have been held to have been valid and authoritative.

* * * * * * *

* * * I must therefore deny all the prayers for instructions which have been presented by counsel on either side, and will sign instructions based on the principles I have indicated.

NEW ORLEANS v. STEAMSHIP CO.

United States Supreme Court, October Term, 1874

20 Wallace 387

Appeal from the Circuit Court of the United States for the District of Louisiana. The city of New Orleans was held in military occupa-

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tion by the Army of the United States from May 1, 1862, until March 18, 1866, when its government was handed over to the proper city authorities. During the military occupation the city was governed by a mayor, a board of finance, and a board of street landings, appointed by the commanding general. On July 8, 1865, the mayor, Kennedy, pursuant to a resolution signed by the chairman of the board of finance and by the chairman of the board of street landings, signed a lease by which the city granted to the Steamship Company the exclusive use of certain water-front property for a term of ten years, at an annual rental of $8,000. The company on its side was bound to build a new wharf in front of the landing and to keep it in repair until the expiration of the lease.

On April 18, 1866, the newly reestablished city government destroyed some of the works which the company, pursuant to the lease, was building. The company sued for an injunction and damages. The city thereupon tendered the notes for rent not yet due.

From a decree granting an injunction and damages the city appealed.

Mr. Justice Swayne. * * * It has been strenuously insisted that the lease was made by Kennedy without authority, was, therefore, void *ab initio*, and, if this was not so, that its efficacy, upon the principle of the *jus post liminium*, wholly ceased when the government of the city was surrendered by the military authorities of the United States to the mayor and council elected under the city charter.

Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject.

They have been repeatedly recognized and applied by this court. (*Cross* v. *Harrison*, 16 Howard, 164; *Leitensdorfer* v. *Webb*, 20 Id. 176;

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The Grapeshot, 9 Wallace, 129.) In the case last cited the President had, by proclamation, established in New Orleans a Provisional Court for the State of Louisiana, and defined its jurisdiction. This court held the proclamation a rightful exercise of the power of the executive, the court valid, and its decrees binding upon the parties brought before it. In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace. It follows as a corollary from these propositions that the appointment of Kennedy as mayor and of the Boards of Finance and of Street Landings was valid, and that they were clothed with the powers and duties which pertained to their respective positions.

It can hardly be doubted that to contract for the use of a portion of the water-front of the city during the continuance of the military possession of the United States was within the scope of their authority. But, conceding this to be so, it is insisted that when the military jurisdiction terminated the lease fell with it. We cannot take this view of the subject. The question arises whether the instrument was a fair and reasonable exercise of the authority under which it was made. A large amount of money was to be expended and was expended by the lessees. The lease was liable to be annulled if the expenditures were not made and the work done within the limited time specified. The war might last many years, or it might at any time cease and the State and city be restored to their normal condition. The improvements to be made were important to the welfare and prosperity of the city. The company had a right to use them only for a limited time. The company was to keep them in repair during the life of the lease, and at its termination they were all to become the property of the city. In the meantime the rental of eight thousand dollars a year was to be paid.

When the military authorities retired the rent notes unpaid were all handed over to the city. The city took the place of the United States and succeeded to all their rights under the contract. The company became bound to the city in all respects as it had before been bound to the covenantees in the lease. The city thereafter collected one of the notes subsequently due, and it holds the fund, without an offer to return it, while conducting this litigation. It is also to be borne in mind that there has been no offer of adjustment touching the lasting and valuable improvements made by the company, nor is there any complaint that the company has failed in any particular to fulfil their contract.

We think the lease was a fair and reasonable exercise of the power vested in the military mayor and the two boards, and that the injunction awarded by the court below was properly decreed. The *jus post liminium* and the law of nuisance have no application to the case.

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We do not intend to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases.

We decide the case upon its own peculiar circumstances, which we think are sufficient to take it out of the rule.

We might, perhaps, well hold that the city is estopped from denying the validity of the lease by receiving payment of one of the notes, but we prefer to place our judgment upon the ground before stated.

Judgment affirmed.

JUSTICES CLIFFORD, DAVIS, and BRADLEY did not hear argument or participate.

MR. JUSTICE HUNT concurred on the ground that by accepting a payment for rent the reconstituted city government had ratified the contract.

MR. JUSTICE FIELD, dissenting. * * * A temporary conquest and occupation of a country do not change the title to immovable property, or authorize its alienation. They confer only the rights of possession and use. When the military occupation ceases, the property reverts to the original owner with the title unimpaired. * * *

STATE OF LOUISIANA EX REL. O'HARA v. HEATH, MAYOR

Supreme Court of Louisiana, June 1868

20 Louisiana Annual 518

Appeal from the Third District Court of New Orleans. The relator had bid at public auction for the contract for cleaning and repairing the streets of New Orleans for a period of three years; the contract had been adjudicated to him as the lowest bidder by the contractor, and that adjudication had been approved by the Common Council. The mayor, however, refused to sign a written instrument expressing the contract, on the ground that General Sheridan, the Military Commander of the Fifth Military District (in which New Orleans was situated), had by S. O. No. 122 of August 21, 1867, revoked the contract. At the relator's suit the District Court granted a mandamus requiring the defendant to affix his official signature.

TALIAFERRO, J. * * * It is argued on the part of the relator that the military commander was without authority to annul a contract, and that the plea of the Mayor, that the contract was abrogated by an order of General Sheridan is without weight. We shall proceed to examine this question.

By the act of rebellion on the part of most of the Southern states, and a combined effort by force of arms to disrupt the National Govern-

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ment, the constitutional and legal State governments existing in these States prior to the war, were broken up. They had been in a state of antagonism to the United States, and by their own act had destroyed the relations that had existed between them and the National Government. In the case of Louisiana, the Constitution of 1864 was framed with the view to restore these relations, which she had lost by participation in the rebellion. But neither the State government of this State under that constitution, nor the State governments existing in the other States recently in rebellion, at the time of the enactment of the reconstruction laws were recognized as having a legal and legitimate existence. The State governments then in operation were for purposes of public policy and convenience declared provisional only, and subject at any time to be modified, controlled or superseded by the paramount authority of the United States. The preamble to the first reconstruction act declares that no legal State governments exist in the several States that were engaged in the rebellion. The first section of that act directs that the rebel States shall be divided into military districts, and made subject to the military authority of the United States. The third section of the same act announces the duties and powers of the military commanders to be appointed for the several districts. The powers granted by this act, and those of the supplemental act, of the 23d of March, 1867, are quite ample, and seem to clothe the commanders of districts with a paramount supervisory power over the civil jurisdiction of these States, and a controlling influence over all the administrative functions and powers of State officials.

By the second section of the supplemental act referred to, the military commanders are vested with power, in their discretion—

> "to suspend, or remove from office or from the performance of official duties and the exercise of official powers, any officer holding or exercising or professing to hold or exercise any civil or military office or duty in such district under any power, election, appointment, or authority derived from or granted by or claimed under any so-called State or the government thereof, or any municipal or other division, etc."

The civil jurisdiction for the reasons noticed, exercised by State and municipal authority, was not suspended, but made subsidiary to military rule. In the ordinary routine of municipal business, the action of the military commander was invoked only in occasional cases; but whenever in his judgment it became proper, it necessarily superseded that of the municipal organization. The action of the City Council, in this view of the state of things, was not paramount and exclusive, but limited and subordinate.

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The jurisdiction of the State tribunals in criminal cases was expressly made permissive only. The civil jurisdiction, it is clear, was intended to be controlled by military power, leaving it within the discretion of the District Commanders when and under what circumstances to exercise that control. Coming then to the matter of the contract which the relator declares upon, we find, that in the judgment of the commander of the District, it presented a case calling for the exercise of his authority, as he declares in his order that "the said contracts being, it is believed, fraudulent in design, and injurious to the best interests of the city, the same are hereby declared to be null and void."

The entering into the contract with the relator by the city officials, was the exercise of official power. The military commander of the District, we have seen, was clothed with authority to suspend these officials from exercising official powers; and if so, he clearly had the right to control their official action, to suspend, modify or supersede it.

* * * * * * *

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed.

Alvarez y Sanchez v. United States

United States Supreme Court, 1910

216 U. S. 167

Appeal from the Court of Claims.

Mr. Justice Harlan. The appellant, an inhabitant and citizen of Porto Rico, seeks to recover from the United States the value of a certain office held by him in that Island before and during the war with Spain, of which office, it is alleged, he was illegally deprived by the United States. A demurrer to the complaint was sustained and judgment given for the United States, the opinion of the Court of Claims being delivered by Chief Justice Peelle. 42 Ct. Cl. 458, 472.

The complaint which, on demurrer, was adjudged to be bad, presents—using substantially the words of the complaint—the following case:

In the year 1878 the claimant, Sanchez, purchased from one Florenzio Berrios y Lopez, for a valuable consideration, the office known as "Numbered Procurador [Solicitor] of the Courts of First Instance of the capital of Porto Rico," at Guayamo, in perpetuity, and in the same year the Governor General of Porto Rico issued a provisional patent in his favor. In 1881 the claimant's tenure of the office was approved and confirmed, and a final patent therefor was issued by the King of Spain, in accordance with the laws, practice and custom of Spain and Porto Rico governing the sale, surrender and transfer of such an office.

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The claimant, it is alleged, thereby became vested with all the legal rights and privileges appertaining to the office.

From the date of the provisional patent issued to him until, as will be presently stated, he was deprived of his office, August 31st, 1899, the claimant exercised all the rights and privileges belonging to the office of Procurador or Solicitor. Under the laws of Spain and Porto Rico, it will be assumed, the office was transferable in perpetuity and vested the incumbent with exclusive rights and privileges, and as a consequence thereof the claimant was entitled under the laws of Spain in force in Porto Rico, during all the time he held the office, to perform its duties and receive its fees and emoluments which, prior to August 31st, 1899, averaged, it is alleged, more than $200 per month, of which he could not be legally deprived except by due process of law.

On the tenth day of December, 1898, a Treaty of Peace between the United States and Spain was concluded and having been duly ratified by the respective countries, was duly proclaimed April 11th, 1899. The Treaty contained these provisions: "Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam in the Marianas or Ladrones." Art. 7. ". . .And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." Art. 8.

A military government was organized in Porto Rico and was maintained there from October, 1898, up to and after April 30th, 1900. On the latter date, General Davis, as Military Governor, issued what is known as General Order 134, containing these among other paragraphs: "XI. The office of Solicitor ('procurador') is abolished. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of Municipal Courts. XII. Hereafter, litigants who do not appear personally shall be represented before the Supreme Court and District Courts exclusively by a lawyer, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur. In the Municipal Courts, litigants may represent them-

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selves or may be represented by an attorney in fact, resident of the place. XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court." That order was issued without notice to claimant and without any complaint being made as to the manner in which he was exercising his rights or discharging his duties.

On the twelfth day of April, 1900, Congress passed (to take effect May 1st, 1900) what is known as the Foraker Act temporarily to provide revenues and civil government for Porto Rico and for other purposes. That act contained this provision: "Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered, or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States." 31 Stat. 77, 79, c. 191, April 12, 1900.

The reasonable value, the claimant alleges, of the "transferable" or "Numbered Procurador of the Courts of First Instance of the capital of Porto Rico," in perpetuity, was $50,000, for which amount he asks judgment. No compensation has ever been made to claimant for the loss of his office, and no action has been taken on his present claim either by Congress or by any Department of the United States Government.

Such is the case made by the claimant in his petition.

The claimant proceeds in his petition on the ground that the effect of the eighth section of the act of Congress of April 12th, 1900, was to confiscate, finally and effectually, without compensation to him, the office which he claims to have lawfully purchased in perpetuity, prior to the occupation of Porto Rico by the military forces of the United States, and the cession of that Island to this country; which confiscation, he insists, could not have been legally done without violating the Treaty between the United States and Spain which was in force when the act of 1900 was passed.

We do not think that the present claim is covered by the Treaty. It is true that a Treaty negotiated by the United States is a part of the Supreme Law of the Land, and that it is expressly provided in the Treaty in question that it "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds . . . of private individuals." But, clearly, those provisions have no reference to public or quasi-public stations, the functions and duties of which it is the province of government to

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regulate or control for the welfare of the people, even where the incumbents of such stations are permitted, while in the discharge of their duties, to earn and receive emoluments or fees for services rendered by them. The words in the Treaty "property . . . of private individuals" evidently referred to ordinary, private property, of present, ascertainable value and capable of being transferred between man and man.

When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that Island and its inhabitants and their property was displaced, the United States, the new Sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the Treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. It is true that Congress did not, we assume, intend by the Foraker Act to modify the Treaty, but if that act were deemed inconsistent with the Treaty the act would prevail; for, an act of Congress, passed after a Treaty takes effect, must be respected and enforced, despite any previous or existing Treaty provision on the same subject. *Ribas y Hijo* v. *United States*, 194 U. S. 315, 324, and authorities cited. If, originally, the claimant lawfully purchased, in perpetuity, the office of Solicitor (Procurador) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done. The intention of Congress in relation to the office of Solicitor or Procurador by the Foraker Act cannot be doubted—indeed, its abolition by Congress is made the ground of the present action and claim. Upon the acquisition of Porto Rico that Island was placed under military government, subject, until Congress acted in the premises, to the authority of the President as Commander-in-Chief acting under the Constitution and laws of the United States. Porto Rico was made a Department by

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order of the President on the eighteenth of October, 1898. By his sanction, it must be presumed, General Order No. 134 was made, abolishing the office of Solicitor or Procurador. That order was recognized by Congress, if such recognition was essential to its validity, when Congress, by the Foraker Act of 1900, provided that the laws and ordinances of Porto Rico, then in force, should continue in full force and effect, *except* "as altered or modified by military orders in force" when that act was passed. It is clear that claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the Island and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States. See *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45, 49. The judgment of the Court of Claims must be affirmed.

It is so ordered.

KETCHUM v. BUCKLEY

United States Supreme Court, October Term, 1878

99 U. S. 188

Error to the Supreme Court of Alabama. In 1859 McGuire was appointed a general administrator for Mobile County; Ketchum and others were sureties on his bond. In September 1865, letters of administration were granted to him upon the estate of William Buckley, deceased, by virtue whereof he administered upon the estate. Decrees were entered against him for the sums due to each of Buckley's heirs, and returned "no property found". George Buckley, an heir, then sued the sureties on the bond. They set up as a defense that in June 1865, the Confederate government in Alabama was overthrown by the United States and a military governor appointed, by force whereof McGuire's office ceased; the letters of administration were therefore void, and consequently his sureties were not liable. Judgment was for the plaintiff.

MR. CHIEF JUSTICE WAITE. We are not willing to hear an argument on the only possible Federal question presented by this case. It is now settled law in this court that during the late civil war "the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not

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impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding." *Williams* v. *Bruffy*, 96 U. S. 176; *Horn* v. *Lockhart et al.*, 17 Wall. 570; *Sprott* v. *United States*, 20 id. 459; *Texas* v. *White*, 7 id. 700. The appointment by the President of a military governor for the State at the close of hostilities did not of itself change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf. It is not alleged that the governor after his appointment undertook by any positive act to remove McGuire from the position he occupied as general administrator, or that McGuire himself at any time ceased to perform the duties of his office by reason of what was done by the President or others towards the restoration of the State to its political rights under the Constitution of the United States. From all that appears in the record, he continued to act during the whole of his term as general administrator of the county, notwithstanding the changes that were going on in the other departments of the State government. Under these circumstances, it is so clear that the judgment of the court below was right, that we grant the motion to affirm.

Judgment affirmed.

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Section V

REGULATIONS

Excerpts From "American Military Government of Occupied Germany, 1918–1920"

Report of the Officer in Charge of Civil Affairs, Third Army and American Forces in Germany

[The report of Colonel Irvin L. Hunt, Infantry, the Officer in Charge of Civil Affairs, is in four typewritten volumes. It has been reproduced in a mimeographed edition, and the first volume of the report has also been printed. The following excerpts are from Volume I, printed edition, 1943, at the pages indicated.]

ACTS WHICH CONSTITUTE PUNISHABLE OFFENSES SHOULD BE CLEARLY SPECIFIED (pages 99–101)

The proclamation to the inhabitants of Germany issued by General Pershing on December 9th, 1918, attempted within a short space to regulate the entire relations between the inhabitants and the army. This was largely added to from time to time by the issuance of additional orders at Advance G. H. Q., at Headquarters of the Third Army and by Commanding Generals of each of the Divisions and Corps, within the limitations pointed out above. These additions may largely be regarded as having been made necessary by special situations which could hardly have been foreseen, and most of which would probably not arise in the military occupation of other or different areas. It is probably true that, by process of construction, the original proclamation could be made to reach most offenses against which the army needs to protect itself. Could the courts be made permanent, and could it be depended upon that men of keen sense and sound judgment would always be detailed as Provost Courts, it would be entirely safe, from the standpoint of the army, to rely upon definitions of offenses couched in general language rather than in a long

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series of specifications. The fact remains, however, that in practice courts cannot always be composed of men of the characteristics mentioned; and furthermore, as it is desirable that offenses should not be committed, wisdom, on the one hand, and fairness to the civil population on the other, require that acts that are to constitute punishable offenses should be specified so clearly that the civilian inhabitants would certainly know what conduct is expected from them. Special Rule (g) of the proclamation of the 9th of December provides that whosoever "commits any act whatsoever injurious to the American army or the obstruction of the military government, will be punished as a military court may direct." To the civilian population, this language meant little in particular. To the various courts it has meant everything in general. Under it, men have been convicted for filing a claim against the army based on the destruction of property, because they asserted that the property destroyed was worth 300 marks, whereas the court found it to be worth only 200 marks. Under it, civilians have been convicted for disrespect towards American officers, noncommissioned officers and privates. In some instances a conviction was undoubtedly warranted, but in other instances there is no question that this broad language was so interpreted as to result in injustice. Examples of convictions under this section for offenses which were petty (if offenses at all), could be given in considerable number. But probably enough has been said to clearly demonstrate that it is unsafe to put an order couched in such general terms as the one in question into the hands of a great number of Provost Courts, whose members are unlearned in the law, and whose experience in such matters is most limited. Ultimately, justice can be, and in this zone has been, done through the power of the Commanding General of the army to set aside judgments erroneously made; but in the meantime an injustice has been done and the admission of that injustice which comes with the reversal of judgments does not fail to have the effect of lessening respect for our courts upon the part of the civilian population.

In this connection, the view is ofttimes expressed and seriously argued, that we are dealing with a defeated enemy and that we need not over-trouble ourselves as to the treatment accorded. A mature reflection, however, must convince even the most radical that the question involved is really not what is due the inhabitants of the defeated country, but what is owed to the victorious country by the army which represents it. An occupying army in a defeated country is making history which is bound to be written. As that army conducts itself, so is the world largely to regard the country which it represents. If its army is dishonorable in its relations with a fallen foe and treats the population with injustice and subjects the people

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to a rule more harsh than is necessary for the preservation of order and the establishment of proper decorum and respect, that army and the country it represents are bound to stand in disrepute before the civilized world. * * *

ORDERS DEFINING OFFENSES SHOULD EMANATE FROM ONE AUTHORITY ONLY (page 101)

Closely allied to the question just discussed, is that of determining the source from which orders for the control of the civilian population should emanate. It has heretofore been pointed out that the civil government of this area was, by G. O. 225, very largely decentralized, and that orders for the government of the civil population of American-occupied territory emanated from ten different sources. Experience has shown that such a system constitutes a large impediment to the following-out of a general policy of central authority. Probably without legal right, yet with recognized authority, the Commanding General of the Army of Occupation has in fact scrutinized orders issued by the Commanding Officers of the various Divisions and Corps and has not hesitated to order their revocation when he has considered them to be in derogation of orders issued by the central authorities, or in contravention of his policies with respect to the government of the area.

The government of the people of an occupied territory must be a strong government. The respect of the people for the authority of the army must be acquired. If that authority wavers, such respect will not be acquired. The issuing of an order today and the revocation thereof tomorrow, can produce but one result, namely, a lack of respect for the issuing authority. That the government of the civil population may be strong, that it may be unwavering, that it may produce respect for its own authority, it is absolutely essential that it shall emanate from one source, and from one source only. * * *

THE ANORDNUNGEN (ORDINANCES) OF DECEMBER 9TH, 1918 (pages 103—105)

* * * it is scarcely feasible, in the seclusion of a headquarters on friendly soil, to compose a code of laws for the government of a hostile people. Knowledge of the customs of the country is vital to such a task, even acknowledging the right of the conqueror to make what ordinances he will. Two-thirds of the trouble which the army experienced and half of the prosecutions before its provost courts were in regard to offenses which constituted a departure, for the Germans, from the customs of centuries. Little or no difficulty was encountered with the civil population in enforcing purely military regulations. The reason for this is to be found in the readiness

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of the average German to understand the necessity of war-measures, and his innate discipline in accepting them. The American regulations, under their German title, the "Anordnungen," which will be discussed in detail in the course of this chapter, covered a wide variety of subjects and circumscribed the daily life of the civilian with so many restrictions and inconveniences that it is not surprising that violations continually occurred. Considering that the German peasant is hardly as intelligent as the average American, it is also not to be wondered at that he could not grasp the continued state of war, which obtained despite his homecoming. It seemed impossible for him to comprehend why, when to all appearances peace had come, he was not permitted to travel to a neighboring town without an array of passports, or why the American military authorities were interested in preventing his enjoyment of a glass of wine with his supper at eight o'clock in the evening. However necessary these restrictive regulations may have seemed to the security and welfare of the American army, they struck deeply at the customs of the people and stored up trouble immeasurable for the troop commanders, provost marshals and army courts. Desirable as law may have been from an idealistic viewpoint, it was bound to be modified, if prepared without a thorough knowledge of the psychology of the population which the army was expected to govern. We have only to point to the failure of the German laws in Belgium to attain even a measure of success, as an example of the truth of this statement. Their very harshness, their failure to appreciate the patriotism and the habits of life of the Belgians, reacted in the end against them and brought together a far from homogeneous race into a united and defiant nation.

Were we to consider the Anordnungen as a hard and fast finality, the results of more than a year of occupation would have to proclaim them a failure. Their provisional character was, however, always realized. The Anordnungen, the basis of all orders of the American military government, soon ceased to be recognizable, so many were the modifications which proved to be necessary, but, in a large sense, they still obtained as the law of the American portions of occupied Germany.

The various regulations of this proclamation will be taken up one by one in the following pages, and their modifications, as made necessary in the light of practical experience, pointed out separately. It is hoped in this way to emphasize the importance in the future of having a thorough knowledge beforehand of the customs of countries to be occupied.

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IDENTIFICATION AND CIRCULATION (pages 105–107)

Identification. Every person above the age of twelve must carry at all times an identity card bearing his signature and address. Such card will be issued and stamped by the appropriate civil authority.

A change of address must be immediately notified to the appropriate civil official and indorsed by him on the identity card.

The head of each household must keep posted on the inside of the outer door of the building a list showing the name, nationality, sex, age and occupation of every person of his household residing in the building.

Circulation. Circulation will be controlled by the American authorities. Burgomasters, under the direction of the American authorities, will regulate travel within the American zone, and will be held responsible for a strict compliance with all regulations. Authority to leave the zone will be granted only by a division or higher commander.

These regulations were promulgated to assure the safety of the army. In the months following the armistice, one could never feel quite certain that hostilities might not recommence. Spies were therefore to be reckoned with, and, incidentally, the many radical agitators who travelled from one city of Germany to another. A strict control of circulation was therefore believed to be necessary.

Contrary to expectations, however, disorders did not arise, and the people of occupied territories eagerly turned from four years of war to the all-absorbing task of revivifying their decayed industrial life. The American army was therefore confronted with a situation to which the Anordnungen were never meant to apply. However necessary restrictions of circulation may be in war, they hardly contribute to restore communities to their ordinary existence. Each week of the occupation, requests of business men to travel from zone to zone and from occupied to unoccupied territories became more and more numerous. They finally became so numerous that the American circulation personnel was not nearly sufficient to investigate the thousands of individual requests for passes. The stamping of passes became a perfunctory performance, irritating to the Germans, who were compelled to wait in line for hours in all sorts of weather, and without corresponding benefit to the United States. While fully alive to such conditions, the American army felt bound to proceed in this matter in accordance with the desires of its Allies. A different set of rules for circulation in each of the Allied zones would have been even more disastrous to the economic unification of occupied territory than were the severe restrictions of the Anordnun-

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gen. Alteration of the circulation regulations was therefore primarily a subject for conference and mutual agreement among the Allies. Such conferences were held monthly at General Payot's headquarters at Wiesbaden, and formed a part of the regular proceedings of the *Direction Générale des Chemins de Fer du Ravitaillement en Allemagne* (Direction of Railways for Food Supply in Germany). The severer restrictions were gradually removed, first by modifying the requirements for travel by a civilian between zones, and later to a very considerable extent between occupied and unoccupied Germany. The adoption of a tri-lingual circulation pass, valid in all the occupied zones, greatly simplified matters.

The demands on the American circulation personnel, however, were diminished only slightly by these modifications. By August, 1919, and with the return of the majority of the army to the United States, it became necessary to employ Germans under American supervision. It is to be clearly emphasized, however, that the employment of German civilians in the American pass-office did not place the control of civil circulation in German hands. The army circulation rules remained in effect as long as American military government continued in undisputed control.

With the publication of the ordinances of the High Commission as military orders of the Commanding General, American Forces in Germany, on January 10th, 1920, the provisions of the Commission in regard to circulation naturally supplanted previous military regulations. Germans were thereafter permitted to circulate freely in occupied territory, subject only to their possession of an identity card and compliance with the rules of their own government.

Up to January 10th, 1920, 2317 German civilians were convicted of violations of the American circulation regulations.

ASSEMBLIES AND MEETINGS (pages 113–115)

All gathering of crowds is forbidden.

No meeting or assembly of persons shall take place without authority of the local military commander. Sessions of courts and councils, schools and religious services may be held as usual.

The restriction and supervision of the right of public assembly in the Rhineland was a military measure which had many precedents in previous occupations. In the Autumn of 1918, Germany's expressed desires for peace were viewed with considerable suspicion and rigid regulations were believed necessary to assure the safety of the invading army. The advisability of promulgating some such regulation had been foreseen as early as December 1st, and Memorandum No. 4, Third Army, had directed unit commanders to forbid crowds and

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meetings in towns along the projected line of march where troops might billet over night.

A résumé of the later modifications of this provision of the Anordnungen may be said to be similar to the trend of modifications of many other ordinances. The continuation of a rigid military government, with hard and fast restrictions, becomes in the end as burdensome to the army as it is oppressive to the civil population. Severest measures were proper while hostilities were in progress, but there existed no justification for retaining them when once the occupied territory had become peaceful and orderly.

The right of assembly was therefore gradually restored to the civil population of the American area. When restriction was removed, however, it was so safeguarded that no increased danger was feared in consequence for the troops from riots or hostile demonstrations.

Every facility was given to the people, even in January, 1919, to discuss the platforms of the political parties which were engaged at that time in the campaign for supremacy in the national elections. As a matter of fact, requests for permission to hold meetings were granted at once under ordinary circumstances. If the meeting appeared suspicious, an American representative was directed to be present and report or check, as the case warranted, inflammatory speeches or disorder. The moderation with which regulations were enforced may be judged from the fact that street parades and celebrations were permitted on May 1st in honor of the German revolution. The many religious processions on church holidays, so common in the Rhineland, were always permitted, although display of the national colors was stringently forbidden.

The return of the German prisoners of war from British and American captivity towards the close of summer was a factor which gave rise to apprehension by the military authorities of possible public disorder. It was practically certain that the families of the prisoners would congregate at railway stations to greet them, especially as many prisoners had been absent from their homes for more than four years. The American authorities did not intend to forbid legitimate welcome of relatives, but they feared that the legitimate welcome of a family might easily be turned by agitators into a hostile demonstration against the occupying forces. Orders were therefore drafted by the Office of Civil Affairs rigorously forbidding processions or celebrations in honor of returning prisoners of war and incidentally prohibiting the display of the German national colors. However, on the special plea of the Oberpräsident of the Rhine Province, this order was never published in the local press. His request was based on the fact that the publication of such an order might be interpreted as forbidding the

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legitimate welcome of the prisoners' families, and, if such were the case, would be certain to give rise to ill-feeling. He begged that he himself be permitted to transmit our instructions to subordinate officials, and said that if this were allowed, the civil officials would accept responsibility in case of disorder. Although the danger of leaving matters of such importance to the discretion of the civil authorities was realized, the request was granted, largely in view of the Oberpräsident's correct attitude in carrying out all previous demands of the army. However, although the same co-operation from the Oberpräsident was received in this matter as in others, an official in the Regierung of Coblence failed to transmit the instructions of the Oberpräsident to the Landrat of Mayen, and there was an unnecessary delay in informing the Landräte of the other Kreise. It was therefore not unnatural that, during the last week in September, our orders should have been violated in the city of Mayen (Kreis Mayen), at that time without an American garrison. The national German colors were flown from a number of homes in the city, and a celebration seems to have been held by the populace generally in honor of the returning prisoners of war. No effort was made by the civil authorities to check the celebration. While, in this instance, the Regierung of Coblence seems mainly to have been at fault, the American policy in regard to the display of the German flag had been so repeatedly announced at the time that permits for religious processions were granted, that the local Mayen officials could not escape a share of the guilt. Both the Burgomaster of Mayen and his chief of police were accordingly suspended from office for thirty days. The responsible official in the Regierung was also suspended from office for a similar period.

Reference has been made in these pages to the fact that supervision of public meetings placed a heavy burden on the shoulders of the American personnel detailed to that work. In Coblence particularly, there were hundreds of meetings weekly, and the Second Section of the General Staff, whose duties included supervision of such meetings, could cover only those of a political and industrial character. In the course of the year 1919, it became evident that no attempt was being made by the German government to stimulate disorder in our area. There was nevertheless a certain danger from radical and revolutionary agitators, which, however, the Oberpräsidium and the Regierung had an even more lively interest than ourselves in checking. Accordingly, on August 26th, control of meetings was turned over to the civil authorities with the following reservations: That notice of meetings of an industrial or political nature should be given by the civil authorities to the Second Section of the General Staff forty-eight hours in advance. This enabled intelligence agents of the army to cover any meeting likely to arouse suspicion.

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It must be recorded that the Oberpräsidium, the Regierung and the Landräte entered into the new arrangements in an entirely proper spirit, and referred all doubtful cases to the American authorities.

PUBLICATIONS (pages 115–116)

> A copy of each newspaper or other periodical publication will be delivered to the local military commander immediately on issue. The appearance of any matter reflecting on or injurious to the American military government will render the publication liable to suspension or suppression. Excepting the periodical press, no printed matter will be published without permission from the local American military authority.

The moderation of the restrictions imposed by the American military government on the press proved in the end to be a wise course. Not only did the United States desire a free discussion of the political issues, which, in December, 1918, were agitating Germany, but it desired in particular that the Rhenish people should have a share in the foundation of the new national government. Criticism in the German press of the allied military governments was of course objectionable, in view of the danger that such criticism might incite disorder. This fundamental principle governed all actions in regard to censorship, and though criticism of the military government was later so defined as to include criticism of the policies of the Allied peace delegates at Paris, it was aimed solely at constituting a safeguard for public order. Newspapers were at all times permitted to discuss the domestic issues before Germany, without interference or pressure on our part. Not once did the American authorities instigate the publication in a German paper of an article of a propagandist nature. Within the limits set by the Anordnungen, the right of free speech was safeguarded to the population of occupied territory.

Coblence was not a center of the printing-trades, and the authorities were never forced to censor books or periodicals other than the local press. The importation of magazines, etc., from unoccupied Germany was an entirely different matter, and one which called for military action. Censorship of periodicals originating elsewhere was, for a while, very irregular. Several magazines were forbidden sale in the American zone, "Kladderadatsch," for instance, which printed matter derogatory to the United States. It was felt, however, that to entirely exclude German periodicals published on the other side of the Rhine was to impose unnecessary hardships on the civil population, the weekly and monthly press on the left bank being unimportant in quantity and quality.

Finally on September 27th, 1919, booksellers were made responsible that no publications on sale in their shops contained matter offensive

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to the military government. This proved a satisfactory solution of the problem, and thereafter but very few complaints on violation of orders reached the Office of Civil Affairs. A certain number of suspensions of the local press for short periods are of record, but in no greater number than one would expect, in view of the prevailing disturbed state of public feeling. No periodical was ever permanently suspended.

Publication of all rules in regard to censorship was decided to be, as early as January, 1919, a function of the Office of Civil Affairs at Advance G. H. Q. Enforcement of the rules so laid down was the duty of the Second Section of the General Staff, and at all times exercised by it.

SPECIAL RULES (pages 118–121)

Whosoever:

(a) Attacks, disturbs or impedes any American troops or officer thereof * * * will be punished as a military court may direct.

Such a regulation was of course absolutely necessary to the occupying forces. Brawls, fights and assaults constantly occurred between soldiers and civilians as a result of over-drinking, and in at least half of these, civilians were the aggressors. Whoever the offender in the matter, however, physical violence by a civilian towards a soldier would have gone a long way towards weakening the army if permitted to go unpunished. This regulation did not of course make it an offense for a civilian to defend himself from unprovoked attack by a soldier, but it did protect the soldier from assaults by civilians, and our military policemen from any physical attempt by the wrongdoer to escape the consequences of his offense. As will be noted in a succeeding chapter, dealing with relations of the army with the people, physical encounters in which soldiers and civilians took part were by no means uncommon occurrences during the occupation. Soldiers were constantly being brought to trial by the military courts, and civilians by the provost courts. Most of the cases, however, were mere brawls, whose origin could be traced to excessive consumption of alcoholic beverages, rather than to defiance of the authority of the military government. Up to November 11th, 1919, 315 civilians had been convicted for violations of this regulation. The subject of the punishments accorded soldiers so involved is treated in the chapter in this report entitled, "Relations between Army and Civil Population in Occupied Territory."

Whosoever: * * *

(b) Destroys, damages, or disturbs any railway, telegraph

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or telephone installation, lighting, water or power system, or any part thereof, * * * will be punished as a military court may direct.

This was still another instance in which the proclamation provided suitable ordinances to protect the security of the army. As Germany every day showed a more and more evident intention of abiding by the terms of the armistice, self-destruction of public works became more harmful to her own interests than to those of the armies of occupation. This paragraph therefore became superfluous and no violation of the regulations was ever recorded.

Whosoever: * * *

(c) Destroys, damages, steals or secretes any property of or in possession of, the American army, * * * will be punished as a military court may direct.

Up to November 11th, 1919, twenty-six civilians were convicted by provost courts for destroying government property, and 724 for stealing the same. The great number of Germans who appear to have stooped to theft during the occupation, would at first sight give cause for reflection, and possibly furnish grounds for the statement that the Rhinelander is not honest. There can be no question, however, that, in view of the dearth of many articles of food and clothing, a certain amount of theft from government stores had to be accepted as normal under prevailing conditions. The *morale* of the nation had been shaken by four years of suffering and want, and the vast stores of army provisions, blankets, etc., offered a tempting prize to people who lacked these very articles. The protection of these supplies was usually insufficient, and arrests were ordinarily made only when the stolen goods were found in possession of the thief. Thefts appeared therefore a simple matter to the lower class German, and as one incurring slight risk of detection. It should be noted, in connection herewith, that many civilians were employed in army *depots* and repair-establishments, which rendered them peculiarly liable to temptation. 781 convictions of German civilians are of record for these offenses up to January 10th, 1920.

Whosoever: * * *

(d) Purchases, receives in pawn or has in his possession, articles of clothing, equipment or rations furnished to American soldiers or belonging to the American armies, * * * will be punished as a military court may direct.

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This regulation was at all times difficult to enforce. More than 1,500 convictions of German civilians for violations thereof are recorded. Despite these convictions, army property still continued to find its way into unauthorized hands, affording ample evidence that our preventative measures were not effective. Lack of food and clothing, which the army possessed in abundance, is, of course, sufficient explanation of the illegal traffic. Clothes, soap, cigarettes, and many articles of foodstuffs could be procured by the Germans from their own sources only in limited quantities. Added to this fact, it must be borne in mind that the prices which had to be paid by a civilian for shoes, clothing, meat, etc., were enormous, particularly in the winter of 1918. Even the most necessary articles became prohibitive luxuries to the laboring man. It is therefore not surprising that soldiers were often approached by businessmen of the "Schieber" variety and offered tempting bribes to transfer these luxuries *sub rosa* to civilian ownership. While exorbitant bribes were no doubt in many cases to blame, the soldier cannot but be accorded a share in the guilt. As long as government property was not authorized to be disposed of to the civil population, offenses could be readily detected and the civilian concerned, punished; but in the spring and summer of 1919, the situation became more complicated, and even thefts more difficult to detect. The Liquidation Commission proceeded about this time to dispose of much of the salvaged clothing and surplus horses and motor-transport belonging to the army. The army itself, and, to some extent, the Hoover Commission also, undertook at the same time to supply large quantities of food and tobacco to the Rhine Province. Such sales increased the chances for the average German to escape detection when he bought sales-commissary articles from soldiers. Purchases of cigarettes by soldiers at the sales-commissary indeed increased so phenomenally that the army finally found it necessary to ration such purchases. This measure to some extent checked the transfer of foodstuffs and cigarettes to German hands. The problem of preventing the illegal disposal of United States property to enemy civilians proved so difficult during the occupation of Germany, that it warrants close attention, in view of the possibility of a future occupation of the territory of an enemy.

OFFENSES COMMITTED BY GERMAN CIVILIANS AGAINST MEMBERS OF AMERICAN ARMY (pages 215–218)

* * * The most numerous class of offenses was violation of circulation orders, that is, infractions of the Allied orders regarding identification cards and passes for travel. * * *

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The next most numerous class of offenses on record was of sale or unlawful possession of United States property * * *.

The third most numerous class of offenses consisted of the 918 violations of sanitary regulations. Most of these cases arose directly from the policy of the army to inculcate American ideas of sanitation among the Germans. In the small country village of the Rhineland, the majority of the houses are built around a central court, which is apt to be unsanitary from the American viewpoint. When the American army arrived in Germany, an order aimed at reducing the danger of influenza and insisting that the inhabitants keep their windows open at night, was quick to arouse a great deal of resentment, so utterly opposed were the German ideas of sanitation to American ones. Many a soldier had his outraged landlord say to him during the first days of American occupation: "What is the use of my heating your room for you all day if you let all the heat out at night?" Summer had come before the people had got used to the idea of opening windows at night, and the American authorities had by that time issued new orders to the civil population.

The manure pile is one of the German peasant's most prized possessions, usually being kept in close proximity to the family kitchen. Inasmuch as manure piles are breeding places for flies, the Commanding General directed that they be scattered over the fields, and that none in future be permitted to accumulate. This order caused no end of annoyance, and really worked a distinct hardship on the people, inasmuch as it compelled them to alter their carefully-arranged system for fertilizing their fields. Most of the 918 cases for violation of sanitary regulations arose from infractions of this order. Enforcement of a change of customs on any people, no matter how insignificant the change may be, is more provocative of dissension than is anything else.

There were 335 trials of civilians for selling wine outside of legal hours, and 517 cases in which distilled liquor and champagne were sold in violation of orders. These 850 [852] cases should be considered as a unit, and they make together the next most numerous class of offenses committed. Here again it will be seen that it is extremely difficult to change long-established customs by a sudden order. The German had always taken alcohol where and when he pleased, naturally could not understand the purpose of the order, and resented what he considered as an interference with his proper habits of life. No other class of offenses compares numerically with those already discussed.

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The orders published by the army were on the whole faithfully complied with, if we except those dealing with alcohol, circulation and sanitation. Probably in the case of the army, at least two of these three were absolutely necessary for the well-being of the army. Yet it is instructive to note that these three rules, inasmuch as they upset the people's scheme of life, caused us more trouble and resulted in more irritation, than did the enforcement of all other American orders put together. This is evidence that it is wise to study the national habits and customs of an occupied country before issuing orders, and that, when issued, those orders should be so framed as to avoid interference with national habits and customs as far as possible.

* * * * * * *

A military occupation which accomplishes its purpose with the least possible friction with the inhabitants is, in the end, the most successful. The Rhinelander to-day feels that although we were severe, we were preeminently fair in our dealings. He also realizes that we did not indulge in petty spite and meannesses, that we told the truth and pursued our objectives openly and directly, without chicanery or double dealing.

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SECTION VI

THE TRIBUNALS OF MILITARY GOVERNMENT

(See FM 27–5, pars. 20–32; and 27–10, pars. 7 and 285–289.)

EX PARTE ORTIZ

Circuit Court, District of Minnesota, Third Division, May 5, 1900

100 Federal Reporter 955

This was a proceeding on a writ of habeas corpus issued on petition of Rafael Ortiz and the return thereto.

HEADNOTE:

Petitioner, a resident native of Porto Rico, and a civilian, was tried, convicted, and sentenced in March, 1899, for a crime committed in that island, by a military tribunal of the United States established during the occupancy of the island by the forces of the United States as conquered territory of Spain. *Held*, that so long as a state of war existed between Spain and the United States, and the island remained Spanish territory, which was until April 11, 1899, when ratifications of the treaty of peace and of cession were exchanged, such tribunal had jurisdiction to try offenses; and, no objection being made to the formal regularity of the proceedings, that petitioner was not entitled to discharge on a writ of habeas corpus.

THE GRAPESHOT

United States Supreme Court, December Term, 1869

9 Wallace 129

Sustaining the Provisional Court for the State of Louisiana in the exercise of admiralty jurisdiction; on appeal from the Circuit Court of the United States for the District of Louisiana.

This case, which in its original form was a libel in the District Court of Louisiana, on a bottomry bond, and, as such, involved nothing but the correct presentation of the principles of maritime law relating

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to that matter, and the examination of a good deal of contradictory evidence, to see how far the particular case came within them, presented subsequently, and in consequence of the rebellion and the occupation by our army of the mere city of New Orleans, while the region surrounding it generally was still held by the Confederate powers and troops, a great question of constitutional law, the question namely, how far, with that clause of the Constitution in force which declares that—

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the *Congress* may from time to time *ordain and establish*,"—

the President could establish a Provisional Court, and how far Congress, on the suppression of the rebellion, could, by *its* enactment, validate the doings of such a court, transfer its judgments, and make them judgments of the now re-established former and proper Federal courts, from one of which, the Circuit Court of the United States for the District of Louisiana, the cause purported to be brought here.

* * * * * * *

THE CHIEF JUSTICE [CHASE] delivered the opinion of the court.

The first question to be examined in this case is one of jurisdiction.

The suit, shown by the record, was originally instituted in the District Court of the United States for the District of Louisiana, where a decree was rendered for the libellant. From this decree an appeal was taken to the Circuit Court, where the case was pending, when, in 1861, the proceedings of the court were interrupted by the civil war. Louisiana had become involved in the rebellion, and the courts and officers of the United States were excluded from its limits. In 1862, however, the National authority had been partially re-established in the State, though still liable to be overthrown by the vicissitudes of war. The troops of the Union occupied New Orleans, and held military possession of the city and such other portions of the State as had submitted to the General government. The nature of this occupation and possession was fully explained in the case of *The Venice*.

Whilst it continued, on the 20th of October, 1862, President Lincoln, by proclamation, instituted a Provisional Court for the State of Louisiana, with authority, among other powers, to hear, try, and determine all causes in admiralty. Subsequently, by consent of parties, this cause was transferred into the Provisional Court thus constituted, and was heard, and a decree was again rendered in favor of the libellants. Upon the restoration of civil authority in the State, the Provisional Court, limited in duration, according to the terms of the proclamation, by that event, ceased to exist.

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On the 28th of July, 1866, Congress enacted that all suits, causes, and proceedings in the Provisional Court, proper for the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana, should be transferred to that court, and heard and determined therein; and that all judgments, orders, and decrees of the Provisional Court in causes transferred to the Circuit Court should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly.

It is questioned upon these facts whether the establishment by the President of a Provisional Court was warranted by the Constitution.

That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here that nothing further need be said on that point.

The object of the National government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

The duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.

What that duty is, when the territory occupied by the National forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitensdorfer* v. *Webb*, the authority of the officer holding possession for the United States to establish a provisional government was sustained; and the reasons by which that judgment was supported, apply directly to the establishment of the Provisional Court in Louisiana. The cases of *Jecker* v. *Montgomery*, and *Cross* v. *Harrison*, may also be cited in illustration of the principles applicable to military occupation.

We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to

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provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States.

PENNYWIT v. EATON

United States Supreme Court, December Term, 1872

15 Wallace 382

Suit in Arkansas after the war, on judgment of court in Louisiana appointed by the military governor of Louisiana. Judgment held valid.

Error to the Supreme Court of Arkansas; the case being this:

On the 3d day of January, 1862, during the late rebellion, the Fourth District Court of New Orleans (then held by a judge appointed by a *military* governor of Louisiana) issued a writ of attachment against the steamer "Thirty-fifth Parallel," of which one Pennywit and certain other persons were owners; each owning a part. These owners had given a promissory note at New Orleans, on the 8th day of October, 1861, for $6795.71, to Eaton & Betterton. Bond with sureties was given, and the attachment was released. Judgment was subsequently rendered against the defendants personally for the amount of the note with interest. Suit was instituted upon this judgment against Pennywit, in a court of Pulaski County, in Arkansas. The defence was that at the time of the original suit, Pennywit was not a citizen of Louisiana, and had not been served with process, but that he was a citizen of Arkansas, then domiciled there, and had ever since remained such. The judgment of the Pulaski County Court was for the defendant, and on appeal taken by the plaintiffs, the judgment was reversed in the Supreme Court of the State. In the meantime Pennywit died, and the suit was revived against his executors, and judgment was rendered against them in pursuance of the mandate of the Supreme Court. This latter judgment was affirmed in the Supreme Court, and the case was brought by writ of error to this court.

THE CHIEF JUSTICE [CHASE]. * * *

The second question relates to the validity of the appointment of the judge who presided in the court of the Fourth District of New Orleans. His commission came from the military governor, who was appointed by the President during the late war. We have already decided that such appointments were within the power of such a governor.

There can have been no good ground for the writ of error under the former adjudications of this court, and there is no attempt to question these adjudications. We are obliged, therefore, to regard this writ of error as prosecuted for delay.

The judgment of the Supreme Court of Arkansas must be

Affirmed, with ten percent. damages.

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In re Vidal

United States Supreme Court, October Term, 1900

179 U. S. 126

Original.

Mr. Chief Justice Fuller delivered the opinion of the court.

This was an application for leave to file a petition for certiorari to review the proceedings of a tribunal established by a General Order, numbered 88, of Brigadier-General Davis, of the United States Army, then commanding the department of Porto Rico and the supreme military authority in that island, in the nature of a *quo warranto* to oust Vidal and others from the municipal offices of the town of Guayama. The application was submitted April 23, 1900, and, as usual, time was given for a brief in opposition, which was presented April 30.

Section 716 of the Revised Statutes brought forward from section 14 of the Judiciary Act of 1789, provides: "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

This court is not thereby empowered to review the proceedings of military tribunals by certiorari. Nor are such tribunals courts with jurisdiction in law or equity within the meaning of those terms as used in the third Article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect of them.

By act of Congress of April 12, 1900, 31 Stat. 77, c. 191, taking effect by its terms on the first of May, the tribunal in question was, as the act states, discontinued, and a United States District Court established as its successor, authorized to take possession of its records and to take jurisdiction of all cases and proceedings pending therein.

The result is, from either point of view, that this application cannot be entertained.

Leave denied.

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SECTION VII

THE POSITION OF MEMBERS OF THE OCCUPYING ARMY

(See FM 27–5, pars. 4*a*, 5, 9*a*, and 24–32; and 27–10, pars. 285–289 and 345–358.)

DOW v. JOHNSON

United States Supreme Court, October Term, 1879
100 U. S. 158

Error to the United States Circuit Court for the District of Maine. On taking possession of New Orleans in 1862 General Butler made a proclamation declaring that until the restoration of the authority of the United States the city would be governed by martial law; that all disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, would be referred to a military court for trial and punishment; that other misdemeanors would be subject to the municipal authority if it desired to act; and that civil causes would be referred to the ordinary tribunals. Under this proclamation the Sixth District Court of the City and Parish of New Orleans was allowed to function.

In January, 1863, Brigadier-General Neal Dow, of the Army of the United States, stationed in Louisiana in command of Forts Jackson and St. Philip, below New Orleans, was sued in said court by Brandish Johnson, the petition setting forth that forces of the command of General Dow had taken from the plaintiff's plantation certain property, by his secret orders, which the petition declared were "unauthorized by his superiors, or by any provision of martial law, or by any requirements of necessity growing out of a state of war." Though served, General Dow made no appearance. Default being entered, judgment was for plaintiff.

Upon this judgment action was brought in the Circuit Court for the District of Maine. "The declaration states the recovery of the judgment mentioned and makes *profert* of an authenticated copy. To it the defendant pleaded the general issue, *nul tiel record*, and three special pleas. The object of the special pleas is to show that the District Court had no jurisdiction to render the judgment in

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question, for the reason that at the time its district was a part of the country in insurrection against the government of the United States, and making war against it, and was only held in subjection by its armed forces. * * *" The judgment was affirmed by the Circuit Court. However, the judges of the Court were opposed in opinion, and the cause was brought here by the defendant by writ of error on a certificate of division of opinion.

MR. JUSTICE FIELD. * * * The important question thus presented for our determination is, whether an officer of the army of the United States is liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war.

* * * When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. * * * In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. * * *

"Nor is the position of the invading belligerent affected, or his relation to the local tribunals changed, by his temporary occupation and domination of any portion of the enemy's country. As a necessary consequence of such occupation and domination, the political relations of its people to their former government are, for the time, severed. But for their protection and benefit, and the protection and benefit of others not in the military service, or, in other words, in order that the ordinary pursuits and business of society may not be unnecessarily deranged, the municipal laws—that is, such as affect private rights of persons and property, and provide for the punishment of crime—are generally allowed to continue in force, and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing, unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army, or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military

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tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.

* * * The country was under martial law; and its armed occupation gave no jurisdiction to the civil tribunals over the officers and soldiers of the occupying army. They were not to be harassed and mulcted at the complaint of any person aggrieved by their action. The jurisdiction which the District Court was authorized to exercise over civil causes between parties, by the proclamation of General Butler, did not extend to cases against them. The third special plea alleges that the court was deprived by the general government of all jurisdiction except such as was conferred by the commanding general, and that no jurisdiction over persons in the military service for acts performed in the line of their duty was ever thus conferred upon it. It was not for their control in any way, or the settlement of complaints against them, that the court was allowed to continue in existence. It was, as already stated, for the protection and benefit of the inhabitants of the conquered country and others there not engaged in the military service.

* * * But there could be no doubt of the right of the army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated, when required by the necessities or convenience of the army, though the owner of property taken in such case may have had a just claim against the government for indemnity.

* * * * * * *

This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army, when in Pennsylvania, as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war. It follows that, in our judgment, the District Court of New Orleans was without jurisdiction to render the judgment in question, and the special pleas in this case constituted a perfect answer

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to the declaration. See *Coleman* v. *Tennessee*, 97 U. S. 509; *Ford* v. *Surget*, id. 594; also *LeCaux* v. *Eden*, 2 Doug. 594; *Lamar* v. *Browne*, 92 U. S. 187; and *Coolidge* v. *Guthrie*, 2 Amer. Law Reg. N. S. 22.

* * * The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law,—the law of war,— and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty.

* * * The judgment of the Circuit Court must, therefore, be reversed * * *.

JUSTICES CLIFFORD AND MILLER dissented.

COLEMAN V. TENNESSEE

United States Supreme Court, October Term, 1878
97 U. S. 509

Error to the Supreme Court of Tennessee. Coleman, a regular soldier in the military service, was tried, convicted, and sentenced to death by hanging, by a court-martial, for murder committed in the State of Tennessee, on March 7, 1865, when that part of Tennessee in which the murder was committed was occupied by the U. S. military forces.

He escaped from confinement and on October 2, 1874, having been apprehended, was indicted in a court of the State of Tennessee for the same murder. He entered a plea of not guilty and former conviction for the same offense by court-martial. The special plea was overruled on the ground that the conviction by court-martial was not a bar to the indictment for the same offense because, by the murder alleged, he was also guilty of an offense against the laws of Tennessee. He was then tried, convicted and sentenced to death. The judgment was affirmed on appeal to the State Supreme Court.

On appeal to the Supreme Court of the United States Coleman's counsel argued that the following portion of the enrollment act of March 3, 1863, conferred exclusive jurisdiction upon courts-martial:

"That, in time of war, insurrection or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are

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in the military service of the United States, and subject to the Articles of War; and the punishment for such offenses shall never be less than those inflicted by the laws of the State, Territory or district in which they may have been committed."

MR. JUSTICE FIELD. * * * In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offences mentioned, when committed by persons in the military service of the United States and subject to the articles of war, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government and making war against it, in other words, when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished.

* * * * * * *

The fact that when the offence was committed, for which the defendant was indicted, the State of Tennessee was in the military occupation of the United States, with a military governor at its head, appointed by the President, cannot alter this conclusion. Tennessee was one of the insurgent States, forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterwards.

The doctrine of international law on the effect of military occupation of enemy's territory upon its former laws is well established. Though the late war was not between independent nations, but between different portions of the same nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition; and the character and form of the government to be established depend entirely upon the laws of the conquering State

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or the orders of its military commander. By such occupation the political relations between the people of the hostile country and their former government or sovereign are for the time severed; but the municipal laws—that is, the laws which regulate private rights, enforce contracts, punish crime, and regulate the transfer of property—remain in full force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror. And the tribunals by which the laws are enforced continue as before, unless thus changed. In other words, the municipal laws of the State, and their administration, remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent.

This doctrine does not affect, in any respect, the exclusive character of the jurisdiction of the military tribunals over the officers and soldiers of the army of the United States in Tennessee during the war; for, as already said, they were not subject to the laws nor amenable to the tribunals of the hostile country. The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people. As respects them, the same acts which constituted offences before the military occupation constituted offences afterwards; and the same tribunals, unless superseded by order of the military commanders, continued to exercise their ordinary jurisdiction.

If these views be correct, the plea of the defendant of a former conviction for the same offence by a court-martial under the laws of the United States was not a proper plea in the case. Such a plea admits the jurisdiction of the criminal court to try the offence, if it were not for the former conviction. Its inapplicability, however, will not prevent our giving effect to the objection which the defendant, in this irregular way, attempted to raise, that the State court had no jurisdiction to try and punish him for the offense alleged. The judgment and conviction in the criminal court should have been set aside, and the indictment quashed for want of jurisdiction. Their effect was to defeat an act done, under the authority of the United States, by a tribunal of officers appointed under the law enacted for the government and regulation of the army in time of war, and whilst that army was in a hostile and conquered State. The judgment of that tribunal at the time it was rendered, as well as the person of the defendant, were beyond the control of the State of Tennessee. The authority of the United States was then sovereign and their jurisdiction exclusive. Nothing which has since occurred has diminished that authority or impaired the efficacy of that judgment.

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It follows, from the views expressed, that the judgment of the Supreme Court of Tennessee must be reversed, and the cause remanded with directions to discharge the defendant from custody by the sheriff of Knox County on the indictment and conviction for murder in the State court. But as the defendant was guilty of murder, as clearly appears not only by the evidence in the record in this case, but in the record of the proceedings of the court-martial,—a murder committed, too, under circumstances of great atrocity,—and as he was convicted of the crime by that court and sentenced to death, and it appears by his plea that said judgment was duly approved and still remains without any action having been taken upon it, he may be delivered up to the military authorities of the United States, to be dealt with as required by law.

So ordered.

MR. JUSTICE CLIFFORD dissented.

EXCERPTS FROM "AMERICAN MILITARY GOVERNMENT OF OCCUPIED GERMANY, 1918–1920"

(References are to Volume I, printed edition, 1943; for full title and description see p. 54, supra.)

CRIMES COMMITTED BY MEMBERS OF AMERICAN FORCES (pages 210–211)

Crimes have been committed to a greater or less extent by every military force occupying a hostile country in time of war. The reader of history knows that crimes by the military are an inseparable, though regrettable, accompaniment of such an occupation. Always appreciating that fact, it became the earnest desire of the American authorities to decrease the number of crimes committed by members of our forces, to the lowest possible minimum, and strict orders were issued to soldiers to uphold the dignity of their country. Crimes nevertheless did occur, and during April and May became a matter of considerable concern to the Commanding General.

It was learned about this time that German officials were keeping a record of all crimes and offenses alleged to have been committed by the Allied forces or members thereof. It was probably their purpose to later publish the statistics thus amassed, as a proof to the world that the Allies had also committed iniquities, and that the German misdeeds in Belgium were by no means unique. While it is quite probable that they did this to exculpate themselves from the odium felt by the world because of their conduct in Belgium, it is also probable that they hoped by its publication to prevent, or at least mitigate, the punishment of those Germans who were charged by the Allies with responsibility for the Belgian atrocities. The average German to this day disbelieves the stories of the Belgian atrocities which have been so widely spread through Allied countries, and feels

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that they were simply a means of propaganda for the Allied press. He bitterly resents their imputation of national savagery and is anxious to rid his country of their stigma by narrating tales of similar Allied brutalities at every opportunity.

The Officer in Charge of Civil Affairs, Third Army, brought this matter to the attention of the Army Commander in a memorandum, dated June 10th, 1919, and made a recommendation that in order to protect the army against false accusation, every complaint against soldiers, however trivial, should be carefully investigated and recorded. This recommendation was approved, and shortly thereafter the Officer in Charge of Civil Affairs directed all German officials in American occupied territory to submit all accusations of misconduct on the part of troops, however trivial, in order that the American authorities might take suitable action. This order was published in Paragraphs 33 and 36, Civil Affairs Bulletins, June 9th and 10th, 1919, respectively:

33. **Reports of alleged offenses against civilians by the military.**—All Officers in Charge of Civil Affairs will immediately call upon their respective Landräte and Oberbürgermeister for a complete report of all cases on file in their respective offices of crimes or offenses alleged to have been committed by American soldiers against civilians. This report will be submitted in English and forwarded to the Officer in Charge of Civil Affairs, Third Army, so as to be received no later than June 15. In case there are no such records on hand, a statement to that effect by the proper official will be forwarded. (See G. O. No. 8, these Headquarters, 29 May, 1919.)

36. **Action on complaints and petitions.**—All formal complaints made by civilians against the military and all applications for clemency by civilians convicted by military courts will, upon being brought to the attention of the Officer in Charge of Civil Affairs, be reduced to written form and will be promptly acted upon by the Officer in Charge of Civil Affairs, or by him presented to such authority as is authorized to act on the matter, and in every case, whether the matter complained of is or is not remedied, or whether the application for clemency is or is not granted, the complaint or application, together with a full report upon the facts and circumstances involved, will be forwarded to the Officer in Charge of Civil Affairs, Third Army.

Following the memorandum of the Officer in Charge of Civil Affairs, the Commanding General published an order requiring that every complaint submitted by a German should be investigated by a commissioned officer. The report submitted was to include the name of the complainant, the name of the accused, if known, the nature and circumstances of the offense charged, and a statement of any disciplinary action taken or, in default of this, the officer's recommendation in the matter. This report was to be submitted through channels to the Officer in Charge of Civil Affairs, Third Army.

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SECTION VIII

TERMINATION OF MILITARY GOVERNMENT

(See F. M. 27–5, par. 4; and 27–10, pars. 271–272 and 279–280.)

LEITENSDORFER ET AL. V. WEBB

United States Supreme Court, December Term, 1857

20 Howard 176

Error to the Supreme Court of the Territory of New Mexico.

MR. JUSTICE DANIEL delivered the opinion of the court. This case is brought before this court upon a writ of error to the Supreme Court of the Territory of New Mexico.

Upon the acquisition, in the year 1846, by the arms of the United States, of the Territory of New Mexico, the civil Government of this Territory having been overthrown, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary Government for the acquired country. By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to the change of sovereignity, would be the appointment or control of the agents by whom and the modes in which the Government of the occupant should be administered—this result being indispensable, in order to secure those objects for which such a Government is usually established.

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This is the principle of the law of nations, as expounded by the highest authorities. In the case of The Fama, in the 5th of Robinson's Rep., p. 106, Sir William Scott declares it to be "the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed." So, too, it is laid down by Vattel, book 3d, cap. 13, sec. 200, that "the conqueror lays his hands on the possessions of the State, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters." In the case of the United States *v.* Perchiman, 7 Peters, pp. 86, 87, this court have said: "It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." (*Vide* also the case of Mitchel *v.* The United States, 9th id., 711, and Kent's Com., vol. 1, p. 177.)

Accordingly we find that there was ordained by the provisional Government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned. By the same authority, the jurisdiction of the Circuit Courts to be held in the several counties was declared to embrace, 1st, all criminal cases that shall not be otherwise provided by law; and, 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. (*Vide* Laws of New Mexico, Kearney's Code, p. 48.) Of the validity of these ordinances of the provisional Government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them.

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On the 9th day of September, 1850, was approved the act of Congress establishing the Territorial Government for the Territory of New Mexico. (*Vide* Stat. at Large, vol. 9, p. 446.) By this act, commonly distinguished as the Organic Law, the legislative and judicial powers of the Territorial Government are provided and defined, to have effect from the passage of that act. The former, (the legislative power,) *vide* sec. 7, it is declared, shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States and the act of Congress above mentioned. The latter, (the judicial power,) *vide* sec. 10, shall be vested in a Supreme Court, in District Courts, and in justices of the peace. That the Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall form a quorum; that the said Territory shall be divided into three judicial districts, and a District Court shall be held in each of said districts by one of the justices of the Supreme Court, at such time and place as shall be prescribed by law. And it is further declared, that the jurisdiction of the several courts, as therein provided for, both appellate and original, and that of the justices of the peace, shall be as limited by law.

On the 19th day of September, 1851, the District Court of the United States for the first judicial district, created by the act of Congress, being then in session, the plaintiff in the attachment moved the court for leave to file therein the papers and proceedings in that case, and that the same might be made a part of the records of the District Court; and it was thereupon ordered by the court, that the case be entered upon its docket. Objection was made by the defendants to the transfer of this case from the Circuit Court of the provisional Government, (*vide* Kearney Code,) to the District Court created by Congress, upon the ground that the Legislative Assembly had no power to authorize such a transfer. This objection was overruled by the District Court, and exception was taken to its decision.

* * * It was, undoubtedly, within the competency of Congress either to define directly, by their own act, the jurisdiction of the courts created by them, or to delegate the authority requisite for that purpose to the Territorial Government; and by either proceeding, to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional Government, to the tribunals of the Government they were about to substitute for the Territory, in lieu of the temporary or provisional Government. This power we consider was, in fact, delegated by Congress to the Territorial Government by the seventh section of the act of 1850, which declares, that "the legislative power of the Territory shall extend to all rightful sub-

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jects of legislation consistent with the Constitution of the United States and with this act;" and by the tenth section of the act, which, after ordaining a Supreme Court, District and Probate Courts, and justices of the peace, and after dividing the Territory into three judicial districts, and directing a District Court to be held in each district, by one of the judges of the Supreme Court, goes on to declare, that "the jurisdiction of the several courts therein provided for, both appellate and original, and that of the Probate Courts, and of justices of the peace, shall be as limited by law."

The inquiry regularly suggested by these provisions of the act of Congress, is not whether they invested the Legislative Assembly with authority to prescribe the subjects for the cognizance of the courts created by that act—of this there can be no doubt—but whether the authority delegated to that Assembly has been *in fact*, and *to what extent*, exerted with reference to controversies previously in litigation in the courts of the provisional Government, and to subjects of controversy subsequently arising.

Under the provisions of the act of Congress above quoted, the Legislative Assembly have, in several instances, prescribed the powers and duties of the Territorial courts, and, among others, by the fourth section of the act of that Assembly, passed on the 12th of July, 1851; by which section it is declared, that the *District* Courts shall have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not specially delegated to some other court; and by the second section of the act of the Assembly, approved on the 14th of July, 1851, expressly providing, "that all bonds, writs, and processes, which have remained in force, shall be carried to a final decision in the courts established by the Legislative Assembly, *to the same effect* as they would have been in the courts previously existing."

As the Legislative Assembly possessed no power to organize or create courts differing from those created by the act of Congress, which act had divided the Territory into districts, and had designated the courts which should be vested either with appellate or original jurisdiction, it would seem to follow that, by an act of the Legislative Assembly, designed to preserve, and to prevent the discontinuance of rights in litigation subsisting in the courts of the provisional Government, the distribution of the cognizance of those rights was intended to be made to courts corresponding in their jurisdiction with the tribunals of the provisional Government.

Such appears to have been the interpretation, by the judges of the Supreme Court of the Territory, of the acts of the Legislative Assembly, and by which interpretation they have recognized the transfer of causes pending in the Circuit Courts of the provisional Govern-

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ment, for final decision, to the *District* Courts under the Territorial Government; and although there is some obscurity in the language of the Territorial statutes on this subject, yet the reasonableness of their interpretation by the Supreme Court and the District Courts of the Territory commends it to our approval, and its adoption conforms to the rule of this court, by which it has followed the construction of local statutes established by the highest judicial authority of the community for whose government they are enacted.

* * * * * * *

Upon the trial in chief, or upon the merits, there appears to have been no question made, nor any point reserved upon the law or the evidence; the record of this trial presents simply the finding of the jury, and the judgment of the District Court upon that finding. The decision of the Supreme Court of the Territory in sustaining the judgment of the District Court must therefore be affirmed.

BURKE v. MILTENBERGER

United States Supreme Court, October Term, 1873

19 Wallace 519

Error to the Supreme Court of Louisiana; the case being thus:

During the recent rebellion, which broke out in the spring of 1861, the State of Louisiana having involved herself in it, the courts of the United States, in the year just named, were excluded from her limits. On the 1st of May, 1862, however, the government troops had captured and occupied the city of New Orleans, and held military possession of it and of certain small parts of the State which had submitted themselves to the lawful authority. But everything was unsettled and insecure. In this condition of things, President Lincoln, on the 20th of October, 1862, issued an executive order, establishing a Provisional Court in Louisiana. It ran thus:

"The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a court of record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be a provisional judge to hold said court, with authority to hear, try,

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and determine, all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana; his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana. A copy of this order, certified by the Secretary of War, and delivered to such judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed."

* * * * * * *

Mr. Justice Davis delivered the opinion of the court.

The only question in this case for our consideration is, whether the Provisional Court of Louisiana, established by the President on the 20th of October, 1862, had ceased to exist, by the terms of the order creating it, on the 3d day of June, 1865, when the plantation in dispute was sold by the marshal of that court, on a *fi. fa.* regularly issued, and purchased by Miltenberger, who took immediate possession of it, and has remained in possession ever since.

The institution of this court was a necessity, on account of the disturbed state of affairs in Louisiana, caused by the civil war, and the authority of the President to establish it was sustained in the case of *The Grapeshot*, reported in 9th Wallace. The duration of the court was limited to the restoration of civil authority in the State, and it is insisted that this limitation expired when the last Confederate general, Kirby Smith, surrendered, which was on the 26th of May, 1865; but this position is inconsistent with the fact conceded on the argument, that military rule prevailed in the city of New Orleans, and the State of Louisiana, for a long time after this event, and after the sale in controversy was made. This in itself is conclusive proof that civil authority was not then restored, and that the Provisional Court was in the rightful exercise of its jurisdiction.

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We do not care, however, to rest our decision on this ground alone, although it is sufficient to dispose of this case, as that court may have transacted business after the military occupation ceased, and it is important, therefore, to settle when its jurisdiction terminated.

It is very clear that the restoration of civil authority in any State could not take place until the close of the rebellion in that State; and the point of time at which this occurred has been the subject of consideration by this court in several cases involving the application of statutes of limitation. The principle established by these cases is, as the war did not begin or close at the same time in all the States, that its commencement and termination in any State is to be determined by some public act of the political departments of the government. This action has fixed the 2d day of April, 1866, as the day in which the rebellion closed in all the States but Texas, and the 20th of August following, as the date of its entire suppression.

It does not, however, follow that the President's proclamation of April 2d, 1866, *ipso facto*, dissolved the Provisional Court of Louisiana, although it unquestionably authorized its dissolution. It is plain to be seen that its dissolution, without proper provision for the business before it, as well as that which had been disposed of, would have produced serious injury, and this state of things, requiring the action of Congress, was doubtless recognized by the President, as nothing is said in the proclamation about this court. If it was subject to be dissolved as soon as the proclamation appeared, and was no longer a court *de jure*, it still had a *de facto* existence until its actual dissolution. This took place on the 28th of July, 1866, when Congress provided for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States. The power of Congress to do this was recognized in *The Grapeshot*, and, indeed, we do not see how it could be questioned, if, as we have decided, its establishment was a rightful exercise of the constitutional authority of the President, during a state of war.

It is contended by the plaintiff in error that an order of General Banks, in military command at New Orleans, during the period of this controversy, which is set out at length in the brief of counsel, operated as an injunction upon the proceedings of the marshal, and that, therefore, the sale of the plantation was unauthorized. The answer to this position is that, in the state of the pleadings and evidence, we are not at liberty to pass upon the legality of this order, or to determine what effect should be given to it if properly issued. It is not in the record at all, and for aught that appears, was never brought to the notice of either of the courts in Louisiana engaged in the decision of the case.

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It may be that the courts of the country would take judicial notice that Louisiana, at the time mentioned, was in the military occupation of our forces, under General Banks, but we know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him.

Judgment affirmed.

SANTIAGO v. NOGUERAS

United States Supreme Court, October Term, 1908

214 U. S. 260

Error to District Court of the United States for the District of Porto Rico.

Headnote:

By the ratifications of the treaty of peace of 1898 with Spain, Porto Rico ceased to be subject to that country and became subject to the legislative power of Congress; but, pending the action of Congress, and the necessary delay in establishing civil government, there was no interregnum, and the authority to govern the territory ceded by the treaty was, by the law applicable to conquest and cession, under the military control of the President as Commander-in-Chief. *Cross* v. *Harrison*, 16 How. 164.

The military authority in control of ceded conquered territory at the time of a treaty of peace continues, if not dissolved by the Commander-in-Chief, until legislatively changed; nor is there any presumption of a contrary intention from the inaction of the legislature. Whatever the cause of delay in legislation it must be presumed that the delay was consistent with the true policy of the Government. *Cross* v. *Harrison*, 16 How. 164.

The authority of a military government continued after treaty of peace ceding the conquered territory, though not unlimited, is of large extent, and includes the power to establish courts of justice. *Leitensdorfer* v. *Webb*, 20 How. 176.

The military government in Porto Rico at the time of the ratification of the treaty of peace continued until superseded by the organic act; and it had power to establish the United States Provisional Court, and that court had jurisdiction to render the judgment involved in this case.

Under the provision of the order establishing the Provisional Court of Porto Rico that it have jurisdiction of controversies between different states and of foreign states, it had jurisdiction of a controversy between a subject of Spain and a resident of Porto Rico.

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The service of the summons in this case by delivering the same at defendant's usual place of abode into the hands of his wife being strictly in accord with the procedure established by the court, the court had jurisdiction to enter judgment by default.

CLEGG v. STATE

Supreme Court of Texas, First Part of the Galveston Term, 1875

42 Texas 605

Appeal from Galveston.

This suit was brought May 20, 1873, by the State against A. W. and E. P. Clegg, to recover of them the sum of sixty-six dollars and sixty-five cents, alleged to be due by them as *ad valorem* income and capitation tax for the year 1870, with eight per cent. interest thereon, from January 1, 1871, and for various other sums.

The defendants demurred generally, and urged several special causes of exception, and answered by general denial and facts attacking the school-tax.

JUSTICE MOORE. * * * The objections to the assessment-roll for the taxes for the year 1870, made by the assessor and collector appointed by the provisional military government under which the laws were administered until superseded by the State government as organized under our present Constitution, were properly overruled. It may be admitted that, for certain purposes, the Constitution must be held to have gone into effect from its adoption by the vote of the people, on the 3d of December, 1869; but this in no way contravenes the proposition, which it is now much too late to question, that the *de facto* ministerial and executive officers exercising authority under and deriving color of authority from the pre-existing provisional government, were not superseded until the organization of the State government under the Constitution. Unquestionably it could not have been the intention of the framers of the Constitution to have left the State without officers, and the people in anarchy, for an indefinite length of time, till the new government could be organized, and those by whom its various functions were to be performed should be selected, and enter upon the discharge of their official duties.

STATE v. JARVIS

Supreme Court of North Carolina, June Term, 1869

63 North Carolina 556

Defendant had been convicted of larceny. He moved to arrest the judgment because the indictment had been found at Spring Term, 1867, and therefore under the military government.

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MR. JUSTICE DICK. The goods alleged in the indictment to have been stolen by the defendant belonged to the prosecutor, and had been in his actual possession. He entrusted them for a few days to the custody and care of the defendant, his servant. In contemplation of law the goods were in the possession of the owner, and the taking of them by the defendant, with the fraudulent purpose of converting them to his own use, was larcency, and the defendant was properly convicted. 2 East. P. C., 564, sec. 14.

The motion to quash the indictment could not be entertained after verdict, and it was properly disallowed by his Honor.

The grounds for the motion in arrest of judgment are untenable:

1. The Court in which the prosecution was instituted was authorized by the laws of the provisional government, and invested with the necessary power of administering public justice, and such laws and judicial proceedings are recognized as valid, and are continued in our present government. Const., Art. IV, sec. 24.

Our present government was formed under the same authority which organized and sustained the provisional government. The two governments are parts of the same system, and the laws of the preliminary government are properly continued until they are altered by the legislation of the permanent government.

2. The jurisdiction of Superior Courts in cases of larceny is not altered by the recent act regulating "Proceedings in Criminal Courts." That act, in ch. 4, sec. 5, gives jurisdiction to justices of the peace in cases "for receiving stolen goods where the value of the property received does not exceed five dollars." This jurisdiction cannot be extended to cases of larceny by an implication arising from ch. 4, sec. 7, of said act.

There is no error in the ruling of his Honor in the Court below, and the judgment must be affirmed.

PER CURIAM.

No error.

[A. G. 062.11 (2–25–43).]

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